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No. 12513

2634

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

O. E. HAMBLETON and HARRIET ELIZA-
BETH HAMBLETON, His Wife,
Appellees.

Transcript of Record

Appeal from the United States District Court
Western District of Washington,
Northern Division.

FILED

JUN 16 1950

PAUL P. O'BRIEN,
CLERK

No. 12513

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Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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GEORGE R. WEST,

Attorney for Appellees,

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Seattle 4, Washington.

United States District Court, Western District of
Washington, Northern Division

No. 1984

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MOTION TO DISMISS

Comes now the defendant, United States of America, and moves the Court for an order to dismiss the above-entitled cause on the following grounds and reasons:

1. That the Court does not have jurisdiction of the said cause pursuant to the provisions of Sections 931 and 943, Title 28, U.S.C. (Federal Tort Claims Act).

2. That the complaint fails to state a cause of action against the United States of America.

This motion is based on the files and records herein.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant U.S. Attorney.

[Endorsed]: Filed Sept. 20, 1948.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

This matter having come on before the undersigned Judge of the above-entitled Court on February 21, 1949, upon defendant's motion to dismiss; both parties being represented by counsel and the court having heard argument thereon and being fully advised in the premises, now therefore,

It Is Ordered that the motion to dismiss heretofore filed herein by the defendant, United States of America, be and hereby is denied.

Done In Open Court this 26th day of February, 1949.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ STANLEY C. SODERLAND,
Attorney for Plaintiffs.

Approved as to Form:

/s/ FRANK PELLEGRINI,
Asst. U.S. Attorney,
Attorney for Defendant.

[Endorsed]: Filed Feb. 26, 1949.

[Title of District Court and Cause.]

COURT'S DECISION ON MOTION

February 21, 1949.

The Court: Upon the authority of *Johnson, et al. vs. United States*, No. 11,948, decided November 5, 1948, by the U.S. Court of Appeals for the Ninth Circuit, and for the reasons (applicable also to the case at bar) stated by that Court in that case as follows:

“The Act (Federal Tort Claims Act) is a blanket renunciation of Government immunity to suit in the case of certain types of claims specifically enumerated therein * * *. The policy which we think underlies and pervades the whole Act lends weight to the view that a claim of the general character of the one here involved is properly within the orbit of the Act and entitled to its procedural benefits unless it clearly appears that the ‘exception’ above noted bars it,” the motion to dismiss this case is denied. Here the action is for damages suffered by plaintiff as the result of an inordinate grilling to which plaintiff was subjected by an army sergeant in the course of a Government investigation being conducted by him. It is a tort cause of action not expressly excepted from the Federal Tort Claims Act as a nonsuable claim. Hence, the action is maintainable under the Act.

[Endorsed]: Filed Mar. 9, 1949.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

For cause of action against the defendant, plaintiffs complain and allege as follows:

I.

Plaintiffs are and at all times mentioned herein have been husband and wife, constituting a martial community under the laws of the State of Washington, residing in Seattle, Washington, in the territorial jurisdiction of the above-entitled court, to-wit, the Northern Division of the Western District of Washington. The acts herein complained of all occurred within said Division and District. Jurisdiction of this action is conferred upon the above-entitled court by U.S.C.A., Title 2, section 931.

II.

At all times mentioned herein William Anderson was a sergeant in the United States Army, acting as a CID agent, and under the jurisdiction of the Provost Marshal, Fort Lewis, Washington. All acts done, as alleged herein, by said William Anderson, were done on behalf of defendant United States of America, while acting within the scope of his office or employment and in the line of duty.

III.

On or about January 20, 1948, said William Anderson called at the home of plaintiffs at 8312 35th Avenue, S.W., Seattle, Washington, while plaintiff

O. E. Hambleton was absent therefrom, contacted plaintiff Harriet Elizabeth Hambleton, in the course of and in order to further an investigation he was conducting, and did the following acts and made the following statements, unreasonably and intentionally subjecting her to the severe emotional distress which she suffered. Said William Anderson grilled plaintiff Harriet Elizabeth Hambleton for a period of about three and one-half hours on matters concerning which she had no knowledge and with which she had no connection. He stated to plaintiff Harriet Elizabeth Hambleton, among other things, that her husband, O. E. Hambleton had left her and was consorting with a redheaded woman, that her said husband was under arrest, being held on charges of grand larceny and drunken driving, and talked to her about her getting a divorce from her husband.

IV.

None of the statements made by said William Anderson, as above-alleged, were true. The statements made were of such a nature, and the continuous grilling carried on was of such a nature that William Anderson knew or should have known that the resulting emotional and mental distress was likely to result in illness and bodily harm to plaintiff Harriet Elizabeth Hambleton. This is particularly true in view of the fact that plaintiff Harriet Elizabeth Hambleton was at the time convalescing from a major operation and her resistance to any emotional stress was low, and William Anderson was informed of that fact and warned not to upset her.

V.

As a direct and proximate result of the actions of said William Anderson as alleged herein, and of the severe emotional distress to which he subjected her, plaintiff Harriet Elizabeth Hambleton suffered injury as follows: She suffered a complete mental collapse so that she was insane for a period of over a month; during which period she was hospitalized and under a doctor's care and underwent severe treatment, including shock treatments, for her mental disorder. The injury caused is continuing and permanent since it left said plaintiff in a condition where the said mental disorder, although now alleviated, is likely to recur. The injury and necessary treatment caused to plaintiff Harriet Elizabeth Hambleton, and is likely to further cause in the future, severe anguish, pain and suffering. Said injuries were all to her damage in the sum of fifteen thousand dollars (\$15,000.00).

IV.

As a direct and proximate result of the actions of said William Anderson as alleged herein, plaintiffs have incurred a doctor bill in the amount of \$270.00, hospital bills in the amount of \$280.52 for plaintiff Harriet Elizabeth Hambleton, and have been damaged in those amounts.

Wherefore, plaintiffs pray judgment against the defendant in the amount of fifteen thousand five hundred fifty dollars fifty two cents (\$15,550.52),

for costs of suit, and for a reasonable amount as attorneys fees.

/s/ STANLEY C. SODERLAND,
Attorney for Plaintiffs.

State of Washington,
County of King—ss.

O. E. Hambleton, being first duly sworn, on oath deposes and says: that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint; knows the contents thereof, and belives the same to be true.

/s/ O. E. HAMBLETON.

Subscribed and Sworn To before me this 4th day of May, 1949.

/s/ GEORGE R. WEST,
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER TO FIRST
AMENDED COMPLAINT

Comes now the defendant, United States of America, and for amended answer to the First Amended Complaint of the plaintiffs, admits, denies and alleges as follows:

I.

The defendant denies the allegations of paragraph I.

II.

Answering paragraph II, defendant admits that William Anderson was a sergeant in the United States Army, acting as a CID agent under the jurisdiction of the Provost Marshal, Fort Lewis, and denies each and every other allegation in said paragraph.

III.

Answering paragraph III, defendant admits said William Anderson called at the home of the plaintiffs and denies each and every other allegation in said paragraph.

IV.

Defendant denies each and all of the allegations of paragraphs IV, V and VI, and specifically denies that plaintiffs have been damaged in the sum of \$15,550.52 or in any other sum whatsoever.

And by way of Further Answer and Affirmative Defenses the defendant alleges as follows:

First Defense

I.

That the cause of action herein arises out of assault, misrepresentation and deceit and that the court, pursuant to the provisions of the Federal Tort Claims Act (Subsection h, Section 2680, Title 28, U.S.C., Judiciary & Judicial Procedure) does not have jurisdiction thereof.

Second Defense

I.

That the Complaint herein fails to state a cause of action against the defendant.

Third Defense

I.

That the cause of action herein is based upon the abuse of discretion on the part of an employee of the Government while exercising a discretionary function on the part of a Federal agency and as such under the provisions of Section 2680, Title 28, U.S.C., Subsection (a), this Court does not have jurisdiction thereof.

Wherefore, having fully answered the First Amended Complaint herein, the defendant prays that this action be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U.S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 20, 1949.

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs by and through their attorney and in reply to the affirmative matter in the Answer of the defendant, admit, deny and allege as follows:

I.

Plaintiffs deny each and every matter and thing in the First Defense.

II.

Plaintiffs deny each and every matter and thing in the Second Defense.

Wherefore, having fully replied, plaintiffs pray that they be granted relief according to the prayer of their First Amended Complaint.

/s/ STANLEY C. SODERLAND,
Attorney for Plaintiffs.

State of Washington,
County of King—ss.

O. E. Hambleton, being first duly sworn, on oath deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true.

/s/ O. E. HAMBLETON.

Subscribed and Sworn To before me this 18th day of June, 1949.

[Seal] /s/ STANLEY C. SODERLAND
Notary Public in and for the State of Washington,
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1949.

[Title of District Court and Cause.]

COURT'S DECISION

The Court: Here the tort of Sergeant Anderson was not in exercising his discretion to interrogate or not to interrogate plaintiff, Mrs. Hambleton, but such tort was in the negligent and distressing manner in which Sergeant Anderson conducted the interrogation of Mrs. Hambleton.

The principle, in my opinion, is like that which applies to the malpractice of a surgeon, who may in his honest discretion operate or not operate, but if he does so, he must apply to such operation that professional skill which is ordinarily applied by reasonably competent surgeons. For his failure to do so, he is liable to the patient for any proximately resulting injuries and damages.

So here, even if Sergeant Anderson exercised discretion as to whether or not he should interrogate Mrs. Hambleton, he was, after deciding to do so, bound to apply reasonably prudent methods, use due

and ordinary care, and to refrain from excessive grilling and any and all other emotionally distressing methods of interrogation likely to injure her body or mind or endanger her health, but Sergeant Anderson did not act within that principle. On the contrary, he grilled Mrs. Hambleton for an unreasonably long time and put to her excessively repetitive questions concerning delicate personal subjects connected with her husband's marital and personal misconduct not related to the person whom Sergeant Anderson was investigating.

As a proximate result of Sergeant Anderson's excessive and unreasonable grilling of Mrs. Hambleton, she sustained a psychic trauma and psychosis putting her out of her mind and requiring that she have electric shock treatments and other hospital care at the Crown Hill Hospital for mental and nervous disorders. Fortunately she has recovered, due to the success of such shock treatments.

Thus, as a proximate and direct result of Sergeant Anderson's negligence and wrongful conduct, plaintiff Mrs. Hambleton has sustained physical and mental injuries and doctors' and hospital bills for which defendant United States of America, whose agent Sergeant Anderson was, is liable to plaintiffs.

For plaintiffs' general damages, the Court awards to them against defendant the total sum of \$5000 and for their special damages, plaintiff Mrs. Hambleton's doctor bill of \$270 in respect to Dr. Riley's services and \$280.52 for the Crown Hill Hospital bill.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come regularly on for trial before the undersigned judge of the above-entitled court, trial therein having been had on the 4th day of November, 1949, and again on the 8th day of November, 1949, and argument of counsel having been heard on the 12th day of November, 1949, witnesses having been sworn and testified, the plaintiffs being present and represented by their attorneys, Stanley C. Soderland and George R. West, the defendant being represented by J. Charles Dennis, United States Attorney, and Vaughn E. Evans, Assistant United States Attorney, and the court being fully advised in the premises, now therefore makes the following

Findings of Fact

I.

Plaintiffs are and at all itmes mentioned herein have been husband and wife, constituting a martial community under the laws of the State of Washington, residing in Seattle, Washington, in the territorial jurisdiction of the above-entitled court, to-wit, the Northern Division of the Western District of Washington. All the acts which the court finds to have been committed in connection with this matter occurred within said Division and District and within the territorial jurisdiction of this court.

II.

At all times pertinent to this matter William Anderson was a Sergeant in the United States Army, assigned as an agent of the Criminal Investigation Division. At the time said William Anderson committed the acts found herein, he was in the course of an investigation of a member of the Armed Forces and was acting within the scope of his official authority.

III.

On or about January 20, 1948, said William Anderson called at the home of plaintiffs at 8312-35th Avenue S.W., Seattle, Washington, while plaintiff O. E. Hambleton was absent therefrom and contacted plaintiff Harriet Elizabeth Hambleton in the course of an official investigation. Said William Hambleton interrogated plaintiff Harriet Elizabeth Hambleton for a period of approximately three and one-half hours and in doing so failed to use reasonably prudent methods and due care in conducting said interrogation. He grilled her excessively and for an unreasonable length of time, subjecting her to repetitive questions and statements on delicately personal subjects not directly connected with the investigation he was conducting and generally used emotionally distressing methods which were likely to injure her body or mind or endanger her health.

IV.

As a direct and proximate result of the above-mentioned unlawful conduct on the part of said

William Anderson, plaintiff Harriet Elizabeth Hambleton sustained physical and mental injuries and a mental and emotional trauma and psychosis resulting in her completely losing her mind and being confined in the Crown Hill Mental Hospital for a period of approximately one month and in said plaintiff being subjected to necessary shock treatments for her mental condition.

V.

As a direct and proximate result of the above-mentioned unlawful conduct of said William Anderson, plaintiffs incurred a doctor bill in the amount of \$270.00 and a bill at said Crown Hill Hospital in the amount of \$282.52 and sustained general damages in the amount of \$5,000.00.

VI.

A reasonable fee to be allowed the attorneys for plaintiffs payable out of the judgment herein is \$1,000.00.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

This court has jurisdiction of the parties and subject matter of this action.

II.

The defendant, United States of America, is liable to the plaintiffs for the damages sustained

by the plaintiffs as set forth in the Findings and plaintiffs are entitled to judgment therefor against said defendant in the total amount of \$5,552.52 and for their costs herein.

III.

The amount set forth in the above Finding should be fixed as the attorneys' fee payable to the attorneys for the plaintiff out of the recovery herein.

Done in Open Court this 21st day of November, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ STANLEY C. SODERLAND,
One of the attorneys for
plaintiffs.

[Endorsed]: Filed Nov. 21, 1949.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1984

O. E. HAMBLETON and HARRIET ELIZA-
BETH HAMBLETON, His Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This matter having come regularly on for trial before the undersigned judge of the above-entitled court, trial therein having been had on the 4th day of November, 1949, and again on the 8th day of November, 1949, and argument of counsel having been heard on the 12th day of November, 1949, witnesses having been sworn and testified, the plaintiffs being present and represented by their attorneys, Stanley C. Soderland and George R. West, the defendant being represented by J. Charles Dennis, United States Attorney, and Vaughn E. Evans, Assistant United States Attorney, and the court being fully advised in the premises, and having heretofore made its Findings of Fact and Conclusions of Law; now, therefore,

It Is Hereby Ordered, Adjudged and Decreed:

I.

Plaintiffs are hereby granted judgment against the defendant, United States of America, in the amount of \$5,552.52 and for their costs and disbursements herein to be taxed.

II.

The sum of \$1,000.00 shall be paid to Stanley C. Soderland and George R. West, as attorneys for the plaintiffs, out of said judgment.

Done in Open Court this 21st day of November, 1949.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ STANLEY C. SODERLAND,
One of the Attorneys for
plaintiff.

[Entered in Civil Docket]: Nov. 21, 1949.

[Endorsed]: Filed Nov. 21, 1949.

[Title of District Court and Cause.]

NOTICE OF EXCEPTION TO THE ENTRY OF
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

Comes now the defendant, United States of America, and respectfully requests that this Honorable Court allow the defendant an exception to the

entry of the Findings of Fact, Conclusions of Law and Judgment heretofore entered, for the following reasons:

1. There is insufficient evidence to support the Findings of Fact.

2. The Findings of Fact are contrary to the preponderance of the evidence.

3. The Conclusions of Law are contrary to the law governing the action herein.

4. The damages awarded the plaintiff are excessive and unsupported by the evidence.

5. The evidence does not state a cause of action in favor of the plaintiff.

6. There is no evidence to support the Finding of Fact that the plaintiff suffered any physical injury.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed Nov. 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: O. E. Hambleton and Harriet Elizabeth Hambleton, his wife, Plaintiffs, and to Stanley C. Soderland and George R. West, Attorneys for Plaintiffs:

Notice is hereby given that the United States of America, defendant above named, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 21, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Asst. U. S. Attorney, Attorneys for United States
of America, appellant.

Copy mailed.

[Endorsed]: Filed Dec. 29, 1949.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR DOCKET- ING RECORD ON APPEAL

Comes now the defendant, United States of America, and pursuant to Rule 73g, Federal Rules of Civil Procedure, moves the Court for an order extending the time to file with the United States Court of Appeals for the Ninth Circuit, the record on appeal in the above-entitled cause to and including Monday, March 27, 1950, which date is the 88th day from the date of filing the notice of appeal in the said cause.

This motion is based upon all the files, records and proceedings herein and upon the stipulation

filed herein and the affidavit of Vaughn E. Evans.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 5, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF VAUGHN E. EVANS

State of Washington,
County of King—ss.

Vaughn E. Evans, being first sworn, upon oath deposes and says:

That he is one of the attorneys for the defendant in the above cause. That Notice of Appeal was filed December 29, 1949. That promptly thereafter affiant directed Patricia Stewart, reporter in the above-entitled cause, to prepare a transcript of the testimony and proceedings at the trial of this cause. That Patricia Stewart has advised the affiant that she cannot begin to prepare such transcript until after February 1, 1950, and that it will take approximately two to four weeks to prepare said transcript.

Affiant believes that approximately three to four weeks will be necessary after receipt of the transcript of testimony in order to prepare and transmit to the United States Court of Appeals for the

Ninth Circuit the record on appeal in the above-entitled cause. Since affiant has no guaranty the transcript of testimony will be prepared and received by March 1, 1950, affiant believes it is reasonably necessary that the time for docketing appeal in the Circuit Court of Appeals be extended to and including Monday, March 27, 1950.

/s/ VAUGHN E. EVANS.

Subscribed and sworn to before me this 4th day of Jan., 1950.

/s/ J. CHARLES DENNIS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 5, 1950.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME FOR
DOCKETING RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties in the above-entitled action, by and through respective counsel of record, that the time for docketing the record on appeal in the above cause with the United States Court of Appeals for the Ninth Circuit may be extended to and including Monday, March 27, 1950.

Dated at Seattle, Washington, this 5th day of January, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney,
Attorneys for Defendants.

/s/ GEORGE R. WEST,

/s/ STANLEY C. SODERLAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 5, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING RECORD ON APPEAL

On motion of the defendant, United States of America, and the stipulation of the parties, and the Court having considered the affidavit of Vaughn E. Evans in support of the motion, it is hereby,

Ordered that the time for docketing the record on appeal in this cause in the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including Monday, March 27, 1950.

Done in Open Court this 5th day of January, 1950.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

The plaintiff hereby consents to the entry of the foregoing order.

/s/ GEORGE R. WEST,
/s/ STANLEY C. SODERLAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 5, 1950.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1984

O. E. HAMBLETON and HARRIET ELIZA-
BETH HAMBLETON, His Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Before: The Honorable John C. Bowen,
District Judge.

ABSTRACT OF TESTIMONY

This case was called for trial on November 4,
1949 at 10:00 a.m. George R. West and Stanley C.
Soderland appeared as counsel for the plaintiffs.
Vaughn E. Evans, Assistant United States At-
torney, appeared as counsel for the defendant,
United States of America.

* * *

TESTIMONY OF DR. FRANCIS E. FLAHERTY

Direct Examination

By Mr. West:

Q. Will you state your name, please?

A. Dr. Francis E. Flaherty.

Q. Where do you reside?

(Testimony of Dr. Francis E. Flaherty.)

A. 2105 East Highland Drive, Seattle.

Q. Where is your place of business?

A. In the Stimson Building, Seattle.

Q. What is your business or profession?

A. Surgeon.

Mr. Evans: We admit the Doctor's qualifications.

Mr. West: Very well.

Q. Doctor, will you state to the Court whether or not, prior to the 20th day of January, 1948, you had a patient by the name of Mrs. Harriet Elizabeth Hambleton? A. Yes, I did.

Q. Mrs. Hambleton is in the courtroom, and I am sure you will testify with her permission. Will you state briefly to the Court the nature of the treatment, if any, that you gave to her?

A. I first saw Mrs. Hambleton as a patient quite some time prior to the operation which was more recently preceding the charge and complaint; in fact, has been known to me as a patient since April, 1945. It was in November of 1947 that I operated on Mrs. Hambleton in Providence Hospital for a serious stomach condition. The operation necessitated removal of three-fourths of the patient's stomach.

The Court: That year was 1947?

The Witness: It was November 14, 1947, Your Honor.

Q. At that time, can you state whether or not the stomach ailment for which you operated on her had any after effect in the nature of mental dis-

(Testimony of Dr. Francis E. Flaherty.)

turbance? Is it the kind of thing which affects the mind, or does it affect the stomach?

A. I would not say it affects the mind. It naturally affected her general physical condition. She was somewhat weakened, and her period of convalescence, as is usual in many of these cases, would be expected to be somewhat prolonged.

Q. Following the operation on November 14, 1947, did you thereafter have occasion to talk to Mrs. Hambleton at your office?

A. Yes, I did.

Q. Was she still your patient at that time?

A. Yes, sir.

Q. During your interviews with her and your general observation of her, would you state that she showed any mental disturbance prior to January 20, 1948?

A. I would say that Mrs. Hambleton was a person of some nervous temperament, but I had never observed any abnormal mental reactions. I would say she was perhaps more nervous than a number of people, maybe more nervous than the average; in fact, I had considered that that might have some bearing on originally the cause of the ulcer for which she was operated, but never had observed any abnormal or psychotic tendencies whatsoever.

Q. Did you have occasion to interview Mrs. Hambleton on or after January 20, 1948?

A. Yes, I did.

Q. Can you place that in point of time? How

(Testimony of Dr. Francis E. Flaherty.)

soon after January 20 did you have occasion to talk to her the first time?

A. January 28, 1948.

Q. State to the Court what you observed in her manner and demeanor and health at that time.

A. Mrs. Hambleton presented herself as a very upset, very disoriented person who was difficult to manage, difficult to talk to, and actually resisted attempts to treat her or lay hands on her or to make an examination at that time. I would say she was definitely suffering from a mentally disturbed condition.

Q. Did you treat her at that time for this mental or nervous condition?

A. I did not treat her for the mental condition.

Q. Did you prescribe any treatment for her at that time?

A. I gave her a sort of Vitamin B, theamin chloride and B complex.

The Court: Were the theamin chloride and B complex the ingredients of the "sort of Vitamin B"?

The Witness: Yes, Your Honor.

Q. What would be the medical purpose in giving the sort of Vitamin B complex?

A. I had determined from questioning Mrs. Hambleton that she had not been eating, that she had gone almost without food or water. She had a fear of eating, felt that everything she had taken was doped or had been drugged. I tried to induce her to take something in the office, which she re-

(Testimony of Dr. Francis E. Flaherty.)

fused. I felt the Vitamin B would help in a certain slight measure to sustain or make up a deficiency because of lack of proper nourishment by mouth.

Q. In the course of your interview with her on the 28th or thereafter, did you or did you not make any suggestion to her that she seek contact with a psychiatrist or person dealing in mental disorders?

A. I recommended and made arrangements for her to see a psychiatrist.

Q. Do you recall his name?

A. Dr. John Riley.

Mr. West: If Your Honor please, that concludes the direct examination of Dr. Flaherty.

The Court: You may cross-examine.

Cross-Examination

By Mr. Evans:

Q. As I understand, Mrs. Hambleton had been your patient since sometime in 1945?

A. Yes, sir.

Q. Was that in relation to the stomach condition that later resulted in an operation?

A. Not at the beginning of our relationship. It was later in the course of subsequent treatments studied and of course treated.

Q. About how long had you been studying her stomach condition prior to her operation?

A. A matter of perhaps several months.

Q. I have heard that this operation was for a peptic ulcer, is that true, or is it something else?

(Testimony of Dr. Francis E. Flaherty.)

A. No, that is true, I might say a duodenal ulcer, an ulcer of the duodenum, which is also called a peptic ulcer. That locates it anatomically in the duodenum, rather than in the stomach.

Q. In the course of your study, did you make any attempt to determine the cause of her condition?

A. Yes. However, in the problem of ulcers, the cause in most instances being so vague, it is difficult or impractical without being extremely meticulous in tracking these things down, and then you very seldom ever do pin down a specific cause. Most of them are unspecific as far as cause or etiology is concerned.

Q. Would emotional stress in any way cause an ulcer?

A. It may. I would hesitate to say it would definitely cause. It is considered a potential cause, or it would undoubtedly aggravate an ulcer if one were present.

Q. It would aggravate an ulcer condition?

A. It may.

Q. In the course of your study of Mrs. Hambleton's case, did you come upon anything which would indicate that Mrs. Hambleton was under any emotional stress?

A. I don't believe there was any serious or pertinent factor. She had mentioned on one or two occasions being nervous about family problems, or trouble with her husband.

(Testimony of Dr. Francis E. Flaherty.)

Q. Did she indicate she was having trouble with her husband?

A. No, she did not indicate trouble with her husband, but she indicated that occasionally his having used alcohol had caused her some anxiety and some nervousness.

Q. Would, in your opinion, a husband's excessive use of alcohol cause sufficient emotional distress on the part of the wife to aggravate her stomach condition?

A. I would simply say it technically could be possible, I would hesitate to say for sure, or have to say that I felt it was exactly the case in this instance.

Q. Did she relate to you any of the circumstances which, as I understand, she told you were worrying her?

A. She did relate the fact that her husband had been in an auto accident. I don't remember the exact location of this accident, some place in——

Q. Was that prior to her operation?

A. No, that was subsequent to her operation.

Q. She made no mention to you of his being in an accident prior to the operation? A. No.

Q. Had she made any mention to you of his excessive drinking prior to the operation?

A. I don't recall that she did.

Q. Perhaps I misunderstood you. Do I understand that prior to the operation, you had no knowledge or information of any trouble with or about her husband that might aggravate her stomach

(Testimony of Dr. Francis E. Flaherty.)

condition? A. No, I did not.

Q. After the operation, as I understand, you gained some information to that effect, is that correct? A. Yes.

Q. Do you recall about the time that you received that information?

A. It was late in December.

Q. Do you have your records with you?

A. Yes, I have.

Q. Would they assist you in any manner in determining the approximate dates when you gained such information?

A. If I may use them to refresh my memory.

Mr. Evans: Is that agreeable?

Mr. West: That is agreeable.

The Witness: December 31, 1947.

Q. Do your records indicate the condition of Mrs. Hambleton after the operation progressively as of the times you saw her? A. Yes, sir.

Q. When was the first time after the operation that your records reveal that you talked to Mrs. Hambleton or gained some knowledge of her condition?

A. I had seen her several times following her discharge from the hospital.

Q. Were those hospital or office calls?

A. Office calls.

The Court: If you can, give the date of the first one, Doctor.

The Witness: The first office call was December 8.

(Testimony of Dr. Francis E. Flaherty.)

The Court: Of what year?

The Witness: In 1947, Your Honor.

Q. What do your records indicate as to her condition at that time?

A. That her general condition was excellent; that she still was having a little stomach discomfort which required careful watching of her diet and emphasis on certain recommendations as to treatment and dietary program.

Q. At that time, was she taking medicine in any form? A. Yes, she was.

Q. When was the next time that you saw her?

A. On December 31, 1947.

Q. What was her condition at that time?

A. That she still had a persistence of indigestion and some gas. Though improved, it still required and necessitated the use of medication.

Q. On December 8, as I understand, you classified her condition as excellent. How would you classify it on December 31?

A. Physically, I think, still excellent or very good.

Q. Still requiring some medication?

A. Yes.

Q. Can you state just precisely the nature of that medication? Was it something that had to be continuous, or was it an occasional dose of something, or what was it?

A. It was prescribed at regular intervals during the day. She was taking an antacid and also a

(Testimony of Dr. Francis E. Flaherty.)

Vitamin C, given to promote healing and to increase her resistance.

Q. At that time, as I understand, you learned something of some emotional disturbance due to something in regard to her husband?

A. Yes, I did elicit the fact that she was a bit worried and had been worried about her husband's drinking.

The Court: At this time, we will take a short recess of about ten minutes.

(Recess.)

The Court: You may resume the examination.

Q. I believe the last question was in regard to your learning on December 31, 1947, from Mrs. Hambleton that there was some emotional disturbance due to some activities of her husband. Do you recall what it was that you learned at that time?

A. That her husband had apparently gone on occasional bouts of drinking, and this had concerned her somewhat.

Q. Did she indicate to you that that was a frequent occurrence, or something that had just come up recently?

A. I don't believe that was mentioned. I don't believe I asked her, as a matter of fact.

Q. In the course of your treatment of Mrs. Hambleton, would that have been a factor about which you would have concerned yourself?

A. Not greatly, although I did advise her to try and compose herself, as far as any nervous

(Testimony of Dr. Francis E. Flaherty.)

dispositions are concerned, in that they may have accounted for some of her indigestion and occasionally a little bit of her acid reaction of her stomach.

Q. When was the next occasion that you saw Mrs. Hambleton?

A. It was on the 19th of January, 1948.

Q. What do your records indicate was her condition at that time?

A. That she was quite nervous. She had, I believe, just received word of her husband being involved in an accident in Nevada, and her impression was that he was in a critical condition. I did prescribe a sedative.

Q. Do your records indicate anything further that you might elaborate on, the results of that interview?

A. No. It was a very short note at that time.

Q. Then I believe you have already gone into the interview on January 28, 1948. Is there anything further in regard to that interview that you can elaborate upon other than what you have already testified to?

A. Other than the patient's story, which would, I suppose, be hearsay.

Q. She gave you a story at that time?

A. Yes, sir.

The Court: If it was considered by you as a means of your prescribing treatment to her at that time it would not be excluded on the ground of

(Testimony of Dr. Francis E. Flaherty.)

hearsay. Although it might be hearsay, it would be admissible hearsay.

Mr. Soderland: If Your Honor please, I think he indicated he did not attempt to treat her for the mental condition in any way, so unless it had something to do with the treatment which he did give her——

The Court: Yes. You are permitted to answer the question by saying what she told you, if you did actually consider that in prescribing treatment for her at that time.

The Witness: I did consider it, Your Honor.

Q. Then will you tell us what it is, what you have in mind?

A. At the time the patient came in to me, she came in with rather an incoherent and disconnected story about—at first she stated she had been doped by, as she referred to the gentleman, a certain Lt. Williams, who had attempted to blackmail her, as she stated, and her husband. She felt as a result of a very unfortunate episode and meeting with him that she was doped, she couldn't eat, she felt everything that she ate was doped or poisoned, and even to the point where she was refusing to drink water.

She stated further that—she rambled in a manner which was evidence that she was having hallucinations—she talked about a syndicate of Communists who were out to get her husband and herself. She mentioned Bing Crosby and Bob Hope as being members of this syndicate, and felt that

(Testimony of Dr. Francis E. Flaherty.)

everybody was against her, and she was afraid to trust anyone, which I witnessed myself when I attempted to give her or offer her water in the office. That is the summary of the story, in brief.

Q. As I understand, at that time, after the treatment which you heretofore described, you turned her over to Dr. Riley? A. Yes, sir.

Q. At the time Mrs. Hambleton was in your office on January 28, that was the first time she had been back, as I understand, since January 19?

A. Yes.

Q. Was she alone or accompanied by someone?

A. She was accompanied by her mother.

Q. Were any of the details which you have just related as to her condition given you by her mother, or by Mrs. Hambleton?

A. No, these were given by Mrs. Hambleton herself.

Q. Was any information given you by her mother in an attempt to assist you in your diagnosis of her condition?

A. Only perhaps a brief preliminary statement that she was very mentally disturbed, and she wanted me to see her.

Q. Did you gain any information as to how long she had been in that condition?

A. No, I did not question her mother on that point, and I could not determine from the patient, of course. Having seen her a very short time prior, I assumed it was only a matter of days, however.

Q. Did you ever receive a report from Dr.

(Testimony of Dr. Francis E. Flaherty.)

Riley as to her condition, the results of this treatment? A. Yes, I did.

Q. Do you have that report with you?

A. Yes, sir.

Mr. Evans: May we have it marked for identification, please?

(Doctor's report marked Defendant's Exhibit A-1 for Identification.)

Q. Was that letter received by you in your regular and usual course of business?

A. Yes, sir.

Q. Does it pertain to treatment given by another doctor to one of your patients?

A. Yes, it does.

Mr. Evans: I believe it would be proper to offer Defendant's Exhibit A-1, Your Honor.

Mr. West: No objection.

The Court: Defendant's Exhibit A-1 is now admitted.

(Defendant's Exhibit A-1 received in evidence.)

Q. Since January 28, 1948, have you treated Mrs. Hambleton on any occasion?

A. Yes, I have.

Q. Have those treatments, your work in that regard, had anything to do with her stomach condition or her mental condition or has it been something entirely foreign to that?

A. It has been for possibly not a directly re-

(Testimony of Dr. Francis E. Flaherty.)

lated situation, but her being somewhat run down and slightly nervous and slightly anemic.

Q. You were treating her for a nervous condition?

A. I did prescribe a small dose of sedative.

Q. Can you give the approximate date of that?

A. That was on the 4th of March, 1949.

Q. If I understand you correctly, prior to the operation, nothing had come to your attention to indicate any trouble between Mr. and Mrs. Hambleton?

A. That is correct.

Q. Nor was there any nervous or emotional distress on the part of Mrs. Hambleton as a result of any of her husband's activities, so far as you were aware?

A. That's right.

Q. Prior to January 28, 1948, had you any occasion to hear Mrs. Hambleton make any allegations of anybody picking on her or trying to poison her or in any manner to indicate that she was fearful of anyone?

A. Not prior to that time.

Q. As I understand, you did not treat Mrs. Hambleton for any mental disorders?

A. I did not.

Q. Do you feel you are qualified to testify on mental disorders?

A. No, I don't believe I would qualify, or I would feel competent. I would recognize one, but I wouldn't make any attempt to evaluate it or to treat it.

Mr. Evans: That is all.

Mr. West: No redirect.

* * *

TESTIMONY OF HARRIET ELIZABETH HAMBLETON

Mrs. Harriet Elizabeth Hambleton testified as follows:

That she is the wife of Oliver E. Hambleton, has three children by this marriage, ages 13, 11 and 8; that she and her husband live together at 8312 85th S. W. in the City of Seattle. On January 20, 1948, a Mr. Anderson called and said he wanted to come out to Mrs. Hambleton's house and talk to her. This telephone call was made at approximately 3:00 in the afternoon. Mr. Anderson arrived at the house some time later, the exact time Mrs. Hambleton could not fix. Shortly after Mr. Anderson arrived, Mrs. Hambleton's mother, Mrs. H. P. Raskin, came to the house.

When Mr. Anderson arrived, he displayed a badge to Mrs. Hambleton but she did not pay much attention to it, just figuring that he had the authority to be there. About the first question which Mr. Anderson asked Mrs. Hambleton was who her attorney was. Mrs. Hambleton told him she did not have an attorney. Mr. Anderson asked, "Well, you are suing for divorce aren't you?" and Mrs. Hambleton replied, "Why no, whatever gave you that idea?" Mr. Anderson then stated, "Well, I have some information that would be very benefit-

(Testimony of Harriet E. Hambleton.)

ing to you in obtaining your divorce and you have some information that would help me." Mrs. Hambleton then testified that she was not contemplating a divorce at that time and so stated to Mr. Anderson. Mr. Anderson again stated he had information which would be helpful to Mrs. Hambleton in obtaining a divorce. Mr. Anderson stated, "You would probably be interested in knowing that your husband is being held on grand larceny charges, or wanted by the Government."

Q. Did he explain how your husband got to Nevada?

A. No, he didn't. He didn't know about my husband being gone at first. I think he was more or less trying to find out where my husband was when he came in, and then he asked me if I knew where he was, and I said, "Yes, I know where he is" and he wanted me to tell him, and I said, "I have to be careful who I tell where my husband is because of the type of business he is in."

* * *

Mr. Hambleton was a private investigator. Mrs. Hambleton acted as Mr. Hambleton's secretary and took care of his business at home pertaining to his work. Mrs. Hambleton considered her husband's business and whereabouts as confidential.

Q. What else did he say?

A. After he told me that he was being held, I asked him, I said, "Did you know that my husband had been in an accident?" and I don't really believe he knew, or maybe he had heard something of it,

(Testimony of Harriet E. Hambleton.)

but he says, "Oh, yes, we know all about that." But then he went on to say that they were interested in locating him, and he asked me if I knew the fellow that left with my husband on his trip, and I said, "Yes, I do" and he said, "Is he a tall, dark fellow?" and I said, "No, he isn't. He is very slight." He said, "Are you sure that he wasn't a tall, dark fellow?" and I said, "No." I said, "I should know who he left with."

Then he asked me how long I had known the fellow he left with, and I said, "We have known him for a good number of years." He said, "That is this Lt. Bennett," and I said, "I don't know whom you are speaking of," and he says, "You know a Lt. Bennett. He went by the name of Crowther or Crowley." I said, "Well, I don't know any Lt. Bennett, but I do know a Crowther. I have heard my husband speak of him," and he said, "He is the one that left with your husband." I said, "No, he didn't leave with my husband, because I know the fellow that did." He said, "Well, how long have you known this fellow?" and he was speaking of the other party and I was speaking of the one that left with my husband. He said, "Have you ever visited in his home?" I said "No" and he wanted to know how well I knew this Bennett, and I told him that I had only met the fellow once, if he was referring to Crowther, that I didn't know him, had never visited with him.

Then he said, "You knew your husband left here

(Testimony of Harriet E. Hambleton.)

with a redheaded woman, did you not?" and I said, "No" and he said "Well, he did." He said, "He got in touch with her, he didn't want you to know it, and he got in touch with her by advertising in the newspaper, 'an investigator travelling south or east,' I don't know which they call it from here, but he made contact with her to meet him, and he left here with her." I said, "I don't believe that's true," and he said, "Yes, he knew two women at Bremerton, or some place."

Then he got up and went to the phone and said, "I'll call this redheaded woman"—"I'll call this woman," rather, and he went to the phone and called a number of clients of my husband that as far as I knew had no bearing on the case. But when he made that phone call, I figured he really was a Government man, an FBI man checking, and that he knew all of our business. Then after that when he questioned me he kept on about the Lt. Bennett, and kept saying, "Well, you must know him," or "You do know him."

Q. Would you say that he was or was not very persistent in this cross-examination or examination of you?

A. I would say he was, for the fact that he was there so long, and covered such few subjects, that he kept pounding the same one at me over and over, and then he would go back to this divorce, that "You can now so and so" and he would refer to things, after I told him I wasn't getting a divorce he would refer back to things.

(Testimony of Harriet E. Hambleton.)

After I would say I did not know Lt. Bennett, he would come back and say, "You visited with him in his home," and then he would get me so confused that—as I say, my mother was down there at the time and he upset me to the point that I asked her for medicine. Then he would ask me about—when he made this phone call to this woman's house, that he found out then that the one he had in mind that my husband left with had been gone for a couple of months, she was from South Carolina, or had been gone a while.

Q. Did I understand you to say you found out that the woman your husband left with was someone else?

A. No, the one that he figured might know something—how can I explain this—after him saying he had left with a redheaded woman, he said he would check on that and he went to the phone and called a client of my husband's whom I knew to be redheaded, and he asked her about someone that was there with her, and she said, from the conversation she had told him that this party had been gone several months previous to my husband's leaving, that she had gone back to some place in the South, either South Carolina or North Carolina some place, so he said, "Well, that is strange. She has been gone several months, so she isn't the one he left with." He said, "I had better check on that redhead deal a little more and let you know, and I'll call you back Thursday."

(Testimony of Harriet E. Hambleton.)

Q. You mentioned that you had asked your mother to get some medicine for you. Did she?

A. Yes, she got me some medicine.

Q. Did you take it, or not?

A. Yes, I did. He said, "What are you taking the medicine for," and I said, "You knew I had been operated on," and he says, "Oh, yes, I knew you had an operation, but I didn't know what for." So mother handed me the medicine, and he said, "Is that what you take for your ulcers?" He said, "I have ulcers, too, but that isn't what I take." I said, "What do you take?" and he said, "Well, you know what I take," and I said, "If you think this is caused from drinking, you are wrong; in fact, I don't drink. This ulcer was caused—as I said, that is a misconstrued idea people have it is caused from drinking. Lots of times they are not caused from drinking," and that ended that, except he immediately started it again, asked me about Lt. Bennett.

Q. After he knew that you were ill or taking medicine, you say he still persisted in asking you questions?

A. Yes, he did. That wasn't too long after he arrived that I took that. He was there then for several hours after that, and mostly the conversation was the same grilling or what you might term third degree, or whatever it is that they keep asking you the same things over and over to see if you are going to change what you are saying. I had told him once so it more or less made me angry that he should

(Testimony of Harriet E. Hambleton.)

doubt my veracity on the things I had already told him.

Q. Do you recall the circumstances under which he left, or why he left?

A. Well, I guess that he had just found out that he wasn't going to get anywhere.

Q. Do you recall if your mother had any conversation with him or not?

A. Well, at one time during the conversation I know Mother told him that he had asked me enough questions, and she said, "I think that she has told you what she knows," or words to that effect. She says, "I don't think you should upset her any more, because she has just had this serious operation, and I think she should take it easy or rest for a while."

Q. After your mother had asked him to leave, or indicated that the conversation should terminate, did he still stay or not?

A. Yes, that was along about the time I took the medicine that she said that.

Q. Did he persist in this continuous grilling you have referred to? A. Yes, sir.

Q. How long did this interrogation of you continue, to the best of your recollection? Was it a matter of minutes or hours, to the best of your recollection?

A. No, I said before in the neighborhood of four hours, and he only covered a few subjects such as we have mentioned here, and those questions were over and over again. I mean they were just asked

(Testimony of Harriet E. Hambleton.)

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(Testimony of Harriet E. Hambleton.)

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(Testimony of Harriet E. Hambleton.)

over and over again all during that time, but I might add that my husband called me while Mr. Anderson was there. My husband called me from Lovelock, Nevada, I believe it is, and asked me if I would check on the insurance of the car to see if we would have any way of paying for the accident.

I said to him, "Was the fellow driving your car a redhead?" It seems a hitchhiker had wrecked my husband's car, it wasn't he himself that had done it, and so putting the data in my mind, I asked him if the driver of the car was a redhead. He says, "Well, no, in fact, I don't know what color hair he has. I guess he is a brunette." He said, "Why?" I says, "I just wondered." When I got off the phone, Mr. Anderson says, "I'm glad you worded it that way and didn't mention the woman to him."

Q. Pardon me. Who said that to you?

A. Mr. Anderson said this after my telephone conversation with my husband.

Q. And you have just testified now that Mr. Anderson was present during your telephone conversation you had with your husband, is that true?

A. Yes, sir. He said, "I'm glad that you didn't say 'redheaded woman' and asked if the driver was a redhead, and not mentioned the woman to him, because I want to check on that some more."

I said, "Well, he wanted me to"—he asked me what the telephone call was concerning, and I said, "He wanted me to check on the insurance for the

(Testimony of Harriet E. Hambleton.)

car." He said, "He wants to get that money from the insurance company to use to pay his way out of jail," or to make bond, or whatever you do, and so naturally when he said that, it began to make a doubt there, thinking, well, perhaps he did want the money for bond, in my confused state. He said, "Yes, that's why your husband is calling to check on that money, for that purpose, because he is being held on grand larceny charges in Nevada," so I asked him what grand larceny was.

Q. Do you now know whether or not these things stated by Mr. Anderson to you were true or not?

A. Yes, sir, I know that they are not true.

Q. They are not true. Do you know if Mr. Anderson is in the courtroom?

A. Yes, he is.

* * *

Mrs. Hambleton believed that Mr. Hambleton was calling her from a hospital, believing that he had some injury as a result of the automobile accident. Prior to this time, Mrs. Hambleton had talked long distance with the doctors and nurses of the hospital and knew that Mr. Hambleton was not in bad physical shape.

Q. After Mr. Anderson left, can you recall any of the circumstances which took place, any of the things that you did, particularly anything as a result of his having been there?

A. Yes, I have recollections of a few things that happened, but I haven't any clear view of all the time after Mr. Anderson left that evening. My

(Testimony of Harriet E. Hambleton.)

mother and stepfather came down to see how I was, and I told them that I had a job to do, that I had to check papers, and I spent most of the night, or all the night checking back through the papers I had. I had saved them and I was looking for this ad that my husband was supposed to have put in the paper to contact someone, so I spent most of the night looking for that ad. Then I don't believe I found it until the next day.

Q. You did find it?

A. I didn't find the ad until the next day, but the next day, the ad that I found was in that morning's paper, and there wasn't anything back three or four weeks before that, at the time my husband left. That was that day's paper, the advertisement in it that he had referred to.

* * *

She stated that she knew a Lt. Williams and his wife but she did not recall going over to their residence at any time after Mr. Anderson's call.

Q. Are there any other circumstances that you can tell the Court what transpired relative to yourself during the next two or three weeks or month following the interview you had with Mr. Anderson?

A. No, sir, not after the last recollection, was on a Sunday.

* * *

In describing Mr. Anderson's manner, the witness stated:

A. To me, it was insulting all the way through

(Testimony of Harriet E. Hambleton.)

because he kept asking me things that I would answer, and I don't like and I was insulted for the fact that he would keep asking me things over and over, and he had a cynical attitude, especially after I told him that I had had a major operation and what it was for. He more or less let me know that he thought it was from drinking. That was insulting, too.

* * *

Mrs. Hambleton stated the last she could remember was on the Sunday following the Tuesday which Mr. Anderson was present at her house. On that day, she went to find a man by the name of Eddy Golder who had worked with her husband.

Cross-Examination

On cross-examination, Mrs. Hambleton testified as follows:

That Mr. Anderson arrived at her house in the neighborhood of 3:30 to 4:00, believing it was closer to 3:00. It was daylight at the time he arrived. All three of her children were at home at the time he arrived. When Mr. Anderson called on the telephone, he stated he was at the naval station and that she directed him from the naval station to her home. It took him longer than she thought it should if he were driving from the naval station. Mrs. Hambleton stated that Mr. Anderson left after dark and she assumed it was close to 8:00. It was approximately 10 or 15 minutes after

(Testimony of Harriet E. Hambleton.)

Mr. Anderson arrived when her mother, Mrs. Raskin arrived.

When Mr. Anderson called he stated that he wanted to talk to Mrs. Hambleton about her husband. Mrs. Hambleton understood from this telephone call that Mr. Anderson was with the army. When Mr. Anderson arrived, he was in civilian clothes.

Witness testified that she had never been separated from her husband. Her husband had been drinking off and on ever since she had known him, even before they were married but that it never caused her any mental distress. At the time Mr. Anderson called upon her, she was anxious as to her husband's condition as a result of the accident but that she had already heard from the nurse and her husband and knew that his condition was satisfactory. She was, however worried about her husband but not to any extent. She further stated she did not like her husband's drinking.

A few months prior to Mrs. Hambleton's operation, her husband was involved in another accident in which he was not hurt.

The witness testified:

Q. During the time that Mr. Anderson was there, did you receive another phone call?

A. Yes, I did.

Q. Do you recall who that call was from?

A. It was from a lady, another former client of his, that I would rather not give her name because that is a strictly confidential case, too, but she called

(Testimony of Harriet E. Hambleton.)

me and said that this party had been to see her, this Mr. Anderson had been to see her, too, and that she had warned him that I had just got out of the hospital with a serious operation. She said that while he was there.

Q. What is this lady's name?

A. I would rather not say, sir.

The Court: She asked, in effect, to be excused from disclosing the name for the reason stated by her, and I would be inclined to respect that request, Mr. Evans.

Mr. West: I would so move, your Honor. I do not see that it is material. She has given the information; it doesn't make any difference who she talked to.

Mr. Evans: She stated this woman told her.

The Court: You have a right to object to her stating hearsay, and the Court will not require her to disclose that woman's name.

Mr. Evans: This is the point I am making, I believe we have a right to know who this woman was to determine the truth or falsity of this statement.

The Court: You did not have to have her state the hearsay just for the purpose of building up the opportunity of having her disclose the name.

Mr. Evans: I didn't know what she was going to say.

The Court: I think it is obvious. The objection is overruled and the request that she be relieved

(Testimony of Harriet E. Hambleton.)

from obligation to disclose the name is granted. She need not disclose the name.

Mr. Evans: May be have an exception?

The Court: You may. Let an exception be noted. In the future, in a similar situation, since she says her husband's occupation was concerning confidential relationships with his clients, you may expect similar rulings, so I ask you to have it in mind in your indulgence of hearsay.

* * *

When asked to describe what she meant by being grilled, the witness stated as follows:

A. Well, sir, I have never been grilled before, but my idea of grilling and third degree is when people keep asking you things over and over again, after you have told them once that a thing is a certain way, and they take up nearly four hours asking you and repeating those same three or four questions, I would consider that a grilling, or what I have seen of third degree, or read of third degree, rather, I haven't seen any, but what I have read of it in most of the books, third degree means grilling a person or asking them over and over things in such a manner that it gets them upset to the point of making them say something different, or what they want you to say.

Q. Did you consider you were under arrest at this time? A. No, sir.

Q. Did Mr. Anderson make any offer or threat of force?

(Testimony of Harriet E. Hambleton.)

A. No, there was no force. I don't know what you would term a threat. There was no threat on my life, but it was threatening. I took it as such because of the lies, what I thought were lies involved, and the manner in which he went about finding out. It seems to me that a person could get information without just keep dogging a person.

Q. Did he do anything or say anything that put you in fear of any bodily harm?

A. No bodily harm, no, sir.

Q. Did he make any threats that he was going to arrest you? A. No, sir.

Q. Did he do anything that would lead you to believe that he would use force or had the means of using any force to obtain any information from you?

A. Well, I can answer that yes, for the simple reason he knew so much about our business that I was afraid he would bring pressure through what he knew of our files, because they were in strict confidence, and when I figured that he knew what was in those files that were supposed to be confidential, I figured that he could use those over us for information. I figured that a Government man could do that if it became necessary to get information from someone.

Q. What I am trying to determine is were you put in any fear of any bodily harm whatever? Was there any threat of force or violence?

A. No, definitely.

Q. Did you object to answering these questions?

(Testimony of Harriet E. Hambleton.)

A. I didn't, because I was trying to find out what he was getting at. I wanted to know what he had on his mind, what he was getting at, why the charge of grand larceny, what my husband had done. Naturally, I wanted to find out what he had done, because it was such a shock to me, these things that he had accused him of.

Q. Just what did he accuse your husband of?

A. Do I have to go through that again? He told me he was held on grand larceny charges in Nevada. He told me he had left the state with a redheaded woman, or had contacted one to leave with him. He wanted to know if I knew he had left here with a redheaded woman, but it wasn't so much what he said—it was that, too, but he just kept on and on at me for so long.'

Q. You say on and on at you?

A. He kept asking me over and over if I knew Lt. Bennett, and I kept telling him no, and he kept asking me again, until finally we decided the party he was talking about had a different name that I knew him by.

Q. Did you finally decide you did know Lt. Bennett?

A. I finally decided I had met this Crowther once, and once only.

Q. Was it some little time before the two of you finally determined that you were talking about the same person but by a different name?

A. Yes. Well, it didn't take too long after he said that his name had been changed.

(Testimony of Harriet E. Hambleton.)

Q. Then you decided that you were both talking about the same person, is that correct?

A. Yes.

Q. Then you decided that you were acquainted with Lt. Bennett, or this other name that you speak of, as well as his wife, is that correct?

A. No.

Q. You don't know his wife at all?

A. I do not. That is why he kept asking me if I had visited this party's home, and I told him no, and he asked me if I knew where he lived, and I said, "I understand he lives in a project out in this neighborhood, on Delridge, or whatever project that is over there," and he said, "Then you do know where he lives." I said, "No, I don't, merely my husband told me that he lived there or was going to move there or some such thing, so as far as visiting in his home, I never did," and he kept wanting me to admit that I knew him and had visited in his home and knew that he had this and that, and I kept denying it, and then he would go back to that again and again.

Q. Did you ever object to answering these questions and carrying on this conversation with him?

A. Object? No.

Mr. West: I think she answered that.

The Witness: I wanted to find out what charges were against my husband, what he had done.

Q. What I am trying to get at, did you ever object to him asking these questions, or were you willing to carry on the conversation?

(Testimony of Harriet E. Hambleton.)

A. Yes, but my mother wasn't.

Q. You were, but your mother wasn't?

A. She told him that she thought that he had talked to me long enough. No, she didn't say that. She said, "I think that she is upset, and that she has answered enough questions."

Q. You were anxious to get information from Mr. Anderson, were you not, as to what he knew and what he had?

A. Yes, sir, I wanted to know just what my husband had done, just what the deal was.

Q. You were asking him about as many questions as he was asking you, weren't you?

A. No, sir, not as many.

Q. You were questioning him, though, weren't you?

A. I just asked—no, I can't say what I asked. I was probably asking him all the time where he got his information and that I didn't like to divulge any information because it might be detrimental to my husband.

* * *

The witness also testified:

Q. Isn't it a fact that you had heard from other sources that there was some question by the authorities in Nevada as to whether or not he was the owner of the car he was driving?

A. No, sir. No, I figured he was in our car.

Q. Well, hadn't you received a call from some local authorities inquiring as to whether or not the

(Testimony of Harriet E. Hambleton.)

car he was driving was in fact his own car or somebody else's?

A. I really don't remember whether I had a call or not. I had so many calls back and forth, I really don't remember whether I had a call stating that or not.

Q. Had you had any information prior to that time that the authorities in Nevada were concerned about whether or not the car your husband was driving was a stolen car?

A. Not that I recall.

Q. You don't recall anything about that at all?

A. I will just have to think about that. It has been so long that it seems that—you see, it is pretty hard for me to remember back a lot of things, because after I came out of the hospital, everything had to come back to me a little at a time, because I didn't remember much about any of it until it came back a little at a time, so therefore, when I can't remember, it isn't because I don't know, it is because I really can't remember. I got so many phone calls that I am trying to recall whether or not I did get one from the police or not. It seems in the back of my mind there is something about a sheriff calling me, but what he said right at the present time, I can't remember what it was. If that would have any bearing on the case, I want to remember it or recall it, but at the present time, I can't seem to remember the conversation. But I would like to add that I wasn't worried about that, because I have lived with my husband

(Testimony of Harriet E. Hambleton.)

too long to know that that is one thing that he wouldn't do, so certainly, if you are trying to find out whether I was worried about it or not, I wasn't, because I know better than that. You just know those things. My husband wouldn't have taken anybody else's car, I wouldn't have that worry. He wouldn't even have driven a borrowed car.

Q. Do I understand this testimony which you have given us here now is things that you have remembered since you came out of the hospital?

A. I remember back before, but there are still spaces that have to be filled in for me at times, such as that. I mean that has been so long ago, that has been over a year and a half, and to remember what my conversation was with that sheriff, I can't recall it enough to testify to it, because I just don't remember exactly the conversation, so I couldn't say.

Q. As the time you came out of the hospital, could you clearly and accurately remember everything you have testified to today?

A. Yes, sir.

Q. You could, clearly and accurately?

A. Wait a minute. You say when I came out of the hospital?

Q. Yes. As I understand, you went to some sanitarium?

A. No, when I first came out of the hospital, no.

Q. You couldn't remember these details you have told us about?

(Testimony of Harriet E. Hambleton.)

A. No, sir. The reason I couldn't remember them is—I don't know how to describe it, because it has never happened to me before, and I don't know when it might happen again, what happened to me, but it is a little hard to tell someone that it hasn't happened to. Things that happened—I have a very good memory, but things that happened all the way back in my childhood have to come in at times and fill in, because they were all a blank, but it is autosuggestion, whatever it is, as soon as you think of one thing you can think of something else and then it recalls it all. It builds up to that.

Q. You have talked with your husband and your mother and probably other people in regard to the events of Mr. Anderson's interview since you came out of the hospital, haven't you?

A. Yes, sir, naturally.

Q. And the suggestions they have made to you have recalled to your memory what took place?

A. Not necessarily their suggestions, just the fact that it had been discussed. This wasn't discussed at all until it became necessary, and it became necessary when the FBI, or whoever it was, started checking in our neighborhood with our friends and all. They didn't know anything about it, and they wanted an answer, wanted to know what was going on. Then it was necessary for me to give them some kind of an explanation, so naturally I did open it up and try to remember.

(Testimony of Harriet E. Hambleton.)

The witness also testified:

Yes, my husband has drunk for a long time, but it has never upset me to any great degree, because it goes back for years and years, and he has been trying to quit. It is more or less a weakness. We all have some type of weakness. I guess that has been his, and he has fought it and has been all along, and it didn't cause me any great distress, because I was certainly used to it. I had more or less had that for all my married life, which has been close to 16 years.

Q. Had his drinking been such that it interfered with his earning a living?

A. No, sir.

Q. Had it been such that it interfered with his ability to support you?

A. I wouldn't attribute it to drinking, because he tries in every way that he could to better himself and make a living and support us. His drinking never interfered with any job he ever had. He has a recommendation from any place he has ever worked, and he has always had very good letters of recommendation. Even when he was with the Army Intelligence, he has that to prove that he has never laid off from work for drinking. His drinking has been merely after working hours. Naturally I would be worried about his drinking, but I have more or less accepted it, trying to help him overcome it.

(Testimony of Harriet E. Hambleton.)

Redirect Examination

By Mr. West:

Q. Just so that there may be no misunderstanding on this, am I correct in that you did tell Mr. Anderson when he came or sometime during your conversation with him that night that you had undergone an operation? A. Yes.

Q. And he told you—am I correct in this—he told you he knew you had? A. Yes.

Q. Am I correct in my recollection that your mother got some medicine for you at the time he was interrogating you? A. Yes, sir.

Q. And he knew that you were taking medicine? A. Yes.

Q. And he knew you were taking it because of your illness? A. Yes.

Q. And he persisted in questioning you after that? A. Yes.

Q. Were you made ill from his questioning of you? A. Sir?

Q. Were you made ill from his questioning of you?

A. Well, I would say so, because Dr. Flaherty had prescribed this medicine for indigestion and upset stomach and I had not been taking it. I mean I am not much of a one to take medicine, and I had not been taking it, but I felt it was necessary to take that medicine while he was there because I was so upset.

Q. That is apart from any mental illness you

(Testimony of Harriet E. Hambleton.)

have suffered as a result of the entire questioning?

A. What?

Q. The fact that you had to take the medicine because of illness while he was there, that illness was quite apart or in addition to any mental illness you may have suffered thereafter, is that correct?

A. Well, when I took the medicine, I just took it.

* * *

Q. Did you take the medicine because you felt mentally ill, or because you felt physically ill at the moment?

A. I felt physically ill, I imagine. I don't know how I felt. I just was upset.

Q. You took the medicine for your stomach?

A. Yes, sir.

* * *

Upon being called for redirect examination, the witness, Mrs. Hambleton testified as follows:

At the time Mr. Anderson called no remark or mention was made of the Fifth Amendment to the Constitution. Mr. Anderson said nothing about whether or not Mrs. Hambleton was obligated to answer his questions.

Q. Can you state at this time whether or not you did most of the talking during this conversation with Mr. Anderson?

A. I wouldn't say, sir, that I did most of the talking.

(Testimony of Harriet E. Hambleton.)

Q. I am sorry, I didn't hear that. Would you repeat your answer, please?

A. I didn't do most of the talking.

Q. Do you know a Mr. Bennett?

A. I know of a Mr. Bennett.

Q. Do you know what his wife does?

A. No, sir, I never met her.

Q. Did you hear the testimony this afternoon that you volunteered to Mr. Anderson that his wife was a model?

A. Yes, sir, I heard that.

Q. Did you vounteer any such information to Mr. Anderson?

A. I don't remember the fact. I don't know the party so I don't see how I could know that.

Q. How many times would you say you had met this Bennett?

A. One time.

Q. I will ask you to recall very carefully and state who first mentioned the name Bennett during the conversation.

A. Mr. Anderson asked me if I knew of a Lt. Bennett. I told him that I didn't.

Q. Did he indicate to you at any time during his interrogation of you that he knew whether or not you had an operation? Did he know of it prior to the time he came there?

A. Yes, he indicated to me that he did know that previous to his coming out, because he mentioned that. He said, "Yes, someone told me that you had just undergone an operation."

(Testimony of Harriet E. Hambleton.)

The following questions and answers were given during this redirect examination.

Q. Did you volunteer to him information that you could have sued your husband many times for nonsupport?

A. Well, yes, I did say that I could have sued my husband lots of times for divorce, but I never had.

Q. Was that before or after the information had been brought up relative to a divorce?

A. That was after.

* * *

TESTIMONY OF DR. JOHN B. RILEY

Dr. John B. Riley testified that he is a medical doctor licensed to practice in the State of Washington and that he does practice in the City of Seattle, being a specialist in neuropsychiatry. Dr. Riley has been engaged in such specialty since 1938.

Dr. Flaherty referred Mrs. Hambleton to him as a patient. Dr. Riley first saw Mrs. Hambleton on January 31, 1948. At that time she was disturbed and psychotic. On the same day, Dr. Riley placed her in the Crown Hill Hospital in Seattle which is an institution for the treatment of nervous and mental diseases. Mrs. Hambleton was discharged from the hospital on February 27, 1948 and Dr. Riley last saw her in his office on March 9, 1948. Upon admission to the hospital, Mrs. Hambleton was extremely tense, depressed, fearful and had

(Testimony of Dr. John B. Riley.)

the feeling people were after her and attempting to harm her. She was hearing voices and rather difficult to care for at first. At the time her memory was essentially non-existent and she was in no condition to be questioned as to her past memory. In the doctor's opinion she recognized her relatives at that time.

The treatment administered to Mrs. Hambleton at Crown Hill Hospital was a combination of electroshock treatment and insulin treatment of which she had ten electroshocks and she made a very rapid recovery after about the fifth or sixth treatment. She temporarily relapsed for three or four days but not to her previous level and then began to improve again. She received her last treatment about February 18, 1948 and remained in the hospital for approximately ten days thereafter, during which time she was essentially normal except for the loss of memory which accompanies and results from shock. When Dr. Riley saw her in his office on March 9, 1948, her memory had improved and she was outwardly essentially normal.

Dr. Riley testified that an individual who had experienced such a breakdown would be more apt to again break down than a person who had never experienced such a breakdown. From the fact that Mrs. Hambleton had had three children and had not suffered any mental breakdown as the result thereof, the doctor was of the opinion that this indicated a relative degree of stability. In other words, it would seem to take quite a good deal to

(Testimony of Dr. John B. Riley.)

break down this woman. The doctor stated that if this woman had endured intense and pursuasive questioning over a period of three or three and one-half hours, during which time misstatements were made and during which she were told things about her husband which were not true, that such could possibly cause her to go into a psychosis.

* * *

Q. Could a protracted period of persistent questioning with grilling constantly recurring on a point which a person had denied, to have it constantly thrown back to them over a period of time, could that, coupled with knowledge that it was a Government official who was carrying on that grilling, cause such an emotional disturbance as might cause an injury such as she sustanied?

A. It could have, yes.

Q. Is medical science in a position to know exactly what causes an injury such as this woman experienced?

A. No, it is not.

Q. In your opinion, would the fact that she had been married and had previously had three children without suffering any such injury or mental disturbance as she later suffered indicate anything to you as to the type of occurrence that might be necessary to cause such an injury?

A. Well, from the standpoint of the type of mental disorder that she showed, it would indicate that it would probably take some rather severe emotional upset to produce a schizophrenic type of reaction.

(Testimony of Dr. John B. Riley.)

Q. This injury that the woman suffered, that required that she definitely have care and attention, did it not?

A. The mental illness which she experienced required attention.

Q. It was something more, was it not, than a mere emotional disturbance?

A. Yes, it was a definite psychosis.

* * *

The doctor described psychosis as insanity. The individual is not neurotic or in contact with reality. They are out of their minds, the presence of delusions or hallucinations is experienced, or complete disorientation with loss of memory.

Cross-Examination

On cross-examination Dr. Riley stated that the treatments which Mrs. Hambleton had invariably produced some memory loss and amnesia which clears up gradually after treatments are over. On March 9, 1948, when the doctor last saw Mrs. Hambleton she had not fully recovered her memory and in that regard was only superficially normal but there were no delusions nor was she experiencing any hallucinations at that time and her behavior was normal.

The doctor stated that patients who have undergone shock treatments do eventually recover their memory except for the period during which they have been psychotic and also for the period im-

(Testimony of Dr. John B. Riley.)

mediately preceding the onset of such psychosis. For example, the first ten days Mrs. Hambleton was in the hospital the doctor does not believe she will ever remember. During an episode of mental disturbance of that severity, a patient would not remember because she had never learned it. In addition to that, she would have forgotten things prior to her mental illness as a result of the treatment.

The doctor stated that you cannot tell positively whether or not a patient has actually recovered her memory or if she is reciting from suggestions that she has heard from other people. You have to take into consideration the appearance of the individual and make your own estimate of their sincerity. The individuals themselves would know definitely whether they had recovered their memory.

Dr. Riley stated that he had an opinion as to what caused the breakdown as set out in his letter to Dr. Flaherty which is Exhibit A-1 in this cause. Dr. Riley stated that he gained the information as to his opinion as set out in such letter from interviewing Mr. Hambleton and Mrs. Raskin. The doctor stated again that it is possible the questioning by Mr. Anderson could have produced the psychosis. The doctor stated, "I do not say that it did, but the time interval and the incident as it took place certainly have to be given quite a bit of consideration in attempting to find a cause for a disorder of this type."

(Testimony of Dr. John B. Riley.)

The doctor stated that he did not believe that by questioning alone an individual could be driven into a state of insanity or psychosis. That in order to produce a psychosis, the questioning would have to be accompanied by worries and threats of one type or another or false information. The doctor stated he could not classify the types of threats which would be required, but that the threats would have to be of sufficient severity to affect the individual's emotional status to a severe degree. As the doctor stated in his letter which is Exhibit A-1, in his opinion, threats, worries and interrogation are what caused Mrs. Hambleton to become insane. In answer to the question whether or not there was any way that anyone could tell in advance whether or not a given person would or would not go into a state of psychosis, the doctor stated:

A. The only way you could form any estimate was if the individual had a previous history of mental disorders, their chances would be greater than the average of breaking down. If they had a definitely positive family history of mental illness, you might suspect their chances of developing mental illnesses under severe stress and emotional strain would be greater than the average. Those two factors are the only way I know of, in a normal person. If you have a definitely schizoid personality or abnormal person to begin with, you might suspect they were verging on psychosis, which opinion you could form by talking to them and looking at them, but if that did not show on

(Testimony of Dr. John B. Riley.)

the outside of the individual and you could not determine by questioning them, the only two factors you could have to prognosticate upon would be the past history of the individual and the family history.

Q. Would that deduction which you have explained be something that only an expert would be able to determine?

A. That is essentially correct.

Q. In other words, a common ordinary investigator going out to talk to someone, there would be nothing that would be a red flag in front of his face that this person might go insane?

A. That is right.

Q. Do you consider mere questioning alone sufficient to precipitate a psychosis in a previously so-called normal person?

A. What type of questioning?

Q. Did you hear Mrs. Hambleton's testimony?

A. Part of it.

Q. You didn't hear all of it? A. No.

Q. The questioning was with regard to her husband's activities, in regard to an automobile accident. A. Over what length of time?

Q. Over what length of time would be required?

A. It would depend on the stability of the individual.

Q. A person who previously had been normal, how long a period of time would you say it would take to break one down?

(Testimony of Dr. John B. Riley.)

A. Anywhere from 30 minutes to ten years.

Q. It could be done in as short a period as 30 minutes?

A. Certain types of questioning by certain people to certain individuals, yes.

Q. The individual has a great deal to do with it?

A. Certainly.

* * *

The doctor further testified as follows:

Q. Some people might go into a state of insanity with less emotional stress than others?

A. Yes.

Q. Isn't it possible that a person may have been on the verge of a psychosis and any small amount of stress would be the trigger mechanism that would cause them to break? A. Yes.

Q. Would worrying over a husband being in an automobile accident, worrying over his perhaps being charged with a grand larceny charge, place a person in a sufficient state of emotional stress that it would take only a very small additional stress to drive them into a state of insanity?

A. It is possible, in some people.

Q. From your examination of, your experiences with Mrs. Hambleton, have you formed any opinion as to whether or not she might be susceptible?

A. Yes, I have. [83]

Q. What is that opinion?

A. I consider her a very stable individual, rela-

(Testimony of Dr. John B. Riley.)

tively speaking, among those who have had a psychosis.

Q. Have you been able to form any opinion as to her condition prior to her psychosis?

A. No, except by outside history.

Q. As I understand, you now consider her very stable?

A. I assume that she has had no mental illness since February, 1949, and I assume she is 31, and I assume she has had three children prior to the age of 28 with no mental illness, and if that is so, I consider her relatively stable among those who have had a mental illness; in other words, compared to other people—not compared to people who have never had a mental illness—who have gone through the same thing.

Q. Do you think that in her present condition that questioning by a Government official would be sufficient stress to produce an acute and severe psychosis?

A. If the same incident were repeated that is alleged to have occurred, I think it could produce the same thing again. In fact, I felt a little sorry for her during her cross questioning on the stand, in view of her past history.

Q. Do you feel that the cross-examination which she was going through here was severe enough perhaps to cause a relapse? [84]

A. No, but I wouldn't want to see her sit here all day. I don't think it would be advisable from her standpoint only.

(Testimony of Dr. John B. Riley.)

Q. Do you consider the cross-examining which she went through here could have been sufficient to have caused a relapse?

A. Today, that I saw?

Q. Yes. A. No, I do not.

Q. Assuming, of course, that she had been under questioning for a period of about two hours?

A. Well, if it were no different than what I saw, I would say no, judging by the way she bore up from it when I was here.

Q. In your practice, Doctor, do you ever question your patients intently in an attempt to delve into their subconscious? A. No, I do not.

Q. You never attempt to precipitate a psychosis in your patients? A. No, I do not.

Q. Do you know that a psychosis is frequently precipitated intentionally by a psychiatrist because with modern methods it is easier to treat a psychosis than it is a deep-seated neurosis?

A. I know the latter statement to be true, but I am not aware of precipitating the psychosis being common practice. I would not approve of those methods myself. The best you could expect after you had treated the psychosis was to return them to their former neurotic state, so I don't know what you would gain.

Q. In your opinion, one who is in a psychosis, after they have been treated by this mental shock are they more apt to go back into their neurosis than they are into a normal state?

(Testimony of Dr. John B. Riley.)

A. If they were neurotic before. If you had a severe neurotic that developed a psychosis, the best I would promise the relatives would be to return them to their former state, not to the state in which they existed prior to the onset of the neurosis.

Q. You know of no cases where a neurotic has been driven or gone into a state of psychosis, been treated with modern methods, and at the conclusion of his treatment he was perfectly normal and no longer had a neurosis?

A. Yes, it happens, but it is not commonplace.

Q. It is not commonplace?

A. No. The great bulk of your neurotics do not go insane, and you do not treat neurotics with shock, if you know they are neurotics. Therefore, the situation is not common.

Q. Have you formed any opinion as to the pre-psychotic personality of Mrs. Hambleton?

A. Only in retrospect, by seeing her now.

Q. In other words, you have formed no opinion other than what you see her now as to what she might have been like prior to her psychosis?

A. I gathered in March, 1948, that she was returning essentially to her former condition inasmuch as it seemed to me to be a normal personality that she returned to, and also her husband and her mother informed me she was now about the way she had been before, and I see little change between now and the last time I saw her; therefore, I assume that in March, 1948, she was exhibiting her normal personality.

(Testimony of Dr. John B. Riley.)

Q. You had the benefit of Dr. Flaherty's examinations, didn't you?

A. No, I do not have.

Q. Did Dr. Flaherty advise you that on the 31st day of December, 1947, she was in an upset condition when she called at his office?

A. I do not recall that. Let's see, December 31? I do not recall that, no.

Q. Were you advised that on January 19, 1948, she was in a nervous and upset condition when she called at Dr. Flaherty's office, and he prescribed a sedative?

A. No, I am not aware of that.

Q. In other words, you didn't go into the background of this woman very thoroughly, did you?

A. I talked to Dr. Flaherty about it when he sent her to me, and I do not know that those things are the case.

Q. You didn't examine his records to try to go back into the background?

A. I never examine any doctor's records. I assume the doctor who refers the case has intelligence enough to pass on to me pertinent information. I do not offend him by questioning him in detail on minor things which he should know. He stated to me that he had operated upon her and that she was physically normal and was now psychotic and he was referring her to me, and the psychosis was of an emergency nature necessitating treatment so we proceeded to treat her, because there was nothing else that was of much importance at that time, or at least of that much importance.

(Testimony of Dr. John B. Riley.)

A. If they were neurotic before. If you had a severe neurotic that developed a psychosis, the best I would promise the relatives would be to return them to their former state, not to the state in which they existed prior to the onset of the neurosis.

Q. You know of no cases where a neurotic has been driven or gone into a state of psychosis, been treated with modern methods, and at the conclusion of his treatment he was perfectly normal and no longer had a neurosis?

A. Yes, it happens, but it is not commonplace.

Q. It is not commonplace?

A. No. The great bulk of your neurotics do not go insane, and you do not treat neurotics with shock, if you know they are neurotics. Therefore, the situation is not common.

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(Testimony of Dr. John B. Riley.)

Q. Were there any psychotic factors associated with her stomach disorder?

A. I don't know anything about that at all.

Q. Or psychiatric factors?

A. I don't know.

Q. You made no inquiry into that?

A. Not that I remember at this time.

Q. In your opinion, are gastric disorders frequently associated with emotional disorders?

A. Well, I wouldn't say frequently, but they definitely are sometimes.

Q. They definitely are sometimes?

A. Yes.

Q. You were aware that Mrs. Hambleton had had an operation for a stomach disorder, a gastric disorder?

A. Yes.

Q. As I understand, you made no attempt to determine whether or not her emotional disorders might be associated with that ailment?

A. Not that I remember, no.

Q. Do you feel you are able to state how much the condition of her husband—that is, what emotional stress might have been associated with her husband being in an accident contributed to her condition?

A. No, I cannot.

Q. During the course of your interviews with the husband and the mother, did you gain any information that her nervous and upset condition might have been caused from her husband's drinking?

(Testimony of Dr. John B. Riley.)

A. I believe I heard something about that.

Q. Was anything reported to you that her husband had caused her considerable trouble and mental grief by his drinking and running around?

A. I just remember having heard that he had been doing some drinking, but it isn't a part of my records, and I don't recall any more than that.

Q. That information came to you as a part of your investigation in order to try to help this woman, as I understand?

A. I knew what to do with this woman whether she had any relatives or not. I did not start off to treat her for neurosis, which requires a very long investigation. She was obviously psychotic, of a certain type, and I put her in the hospital and got her well with the same method of treatment I would use if I hadn't known a thing about her. Following that, she had no complaints so I discharged her. Had I been treating her as a neurotic, I would have known a hundred times more about her background than I now know, but Dr. Flaherty never indicated that there was any neurosis present, or that he desired any treatment for that. He sent me a psychotic patient and I treated her for that and turned her loose at the expiration of that time, and no facts were necessary at all as to know what to do with the treatment.

Q. In your opinion, from the facts which you have gained, do you think the husband's behavior and his accident were contributory to her emotional upset?

(Testimony of Dr. John B. Riley.)

A. I don't know anything about his behavior. I vaguely remember somebody said he had been drinking; I don't know who said it or how much or how severe or anything else.

Q. Did you know about it?

A. I think I did, yes.

Q. Now that you know about it, do you think it contributed to her emotional upset?

A. I would have to know a lot more about how much drinking he had been doing, how severe, and what type of drinker, etc. Naturally it is something that can't be completely overlooked, and if I knew all about it, I could give you an honest answer, but I do not know all about it, and so therefore I cannot. But if it had been of any severity, it must be considered contributorily, and then it would have to be weighed with the other emotionally traumatic events to see which were the most severe. That is the best I can tell you on that.

* * *

Redirect Examination

Upon redirect examination, Dr. Riley testified as follows:

Q. Some mention was made of the time interval involved here. Assuming that she was not mentally disturbed in any way on the 21st day of January, and that she was mentally disturbed on the 28th day of January, is that time interval such that an emo-

(Testimony of Dr. John B. Riley.)

tional disturbance on the 21st day of January could have caused her condition?

A. Yes, that is possible.

Q. If this patient on the 21st day of January was subjected to the grilling, the questioning for the protracted period of three and a half hours or thereabouts, as I asked you previously, if she had recently recovered from a severe stomach operation and was still recovering, then would you say that from placing her in a state of severe emotional stress, that this psychotic condition might be one of the results to be anticipated?

A. No, I could never anticipate the psychotic condition, but if you mean would the grilling on top of a major operation make her more prone to develop trouble, than if she hadn't had the operation, I would say yes.

* * *

TESTIMONY OF LT. CLARENCE J. WILLIAMS

Lt. Clarence J. Williams testified that he is a First Lieutenant, Transportation Corps, United States Army, stationed at Fort Lawton, Washington; that he has known Mr. and Mrs. Hambleton for some period of time.

On January 23, 1948, Mrs. Hambleton, in the company of her mother, Mrs. Raskin, called at his house. Mrs. Hambleton inquired of Lt. Williams as to why the army was investigating Mr. Hambleton. Lt. Williams denied any knowledge of such

(Testimony of Lt. Clarence Williams.)

an investigation. Mrs. Hambleton talked in tangents and was generally incoherent. When Lt. Williams offered her a Coca Cola, she accused him of trying to poison her and refused to take it.

Four days later, Lt. Williams saw Mrs. Hambleton at her home at which time she was in bed and that in his opinion she did not recognize him. On the last Friday in January of 1948, Lt. Williams again called at Mrs. Hambleton's home at which time she did not recognize him. At that time, Mrs. Hambleton stated, "Is this another one of my enemies?"

TESTIMONY OF EDWIN A. GOLDER

Mr. Golder testified that he is a police officer working for the City of Seattle and that he has known Mr. and Mrs. Hambleton a considerable period of time and considers them among his circle of friends.

On the Sunday following January 20, 1948, Mrs. Hambleton called at his home somewhere around noon. In his opinion, she appeared to be upset and he knew immediately there was something wrong. They sat in the living room and Mrs. Hambleton had a handkerchief in her hand which she was twisting and tearing. Mrs. Hambleton wanted to know what he knew about Mr. Hambleton being arrested on a charge of grand larceny and supposedly being out of town with another woman. Mr. Golder denied any knowledge of these facts.

(Testimony of Edwin A. Golder.)

At intervals Mrs. Hambleton would break down and cry. Mr. Golder testified that Mrs. Hambleton definitely was not herself on that particular date.

Cross-Examination

On cross-examination Mr. Golder stated that from his observations he knew that Mr. Hambleton was addicted to the use of alcohol.

TESTIMONY OF MRS. HENRY RASKIN

Mrs. Raskin testified that she is the mother of Mrs. Hambleton and that she resides in the same neighborhood as Mr. and Mrs. Hambleton.

Mrs. Raskin testified that she went to her daughter's home on or about January 20, 1948 and found Mr. Anderson and her daughter present. She fixed the time that she arrived at about 4:15 in the afternoon. When she arrived, Mr. Anderson was "grilling" and quizzing Mrs. Hambleton about something which seemed to Mrs. Raskin not to be of any interest to Mrs. Hambleton at all and that she, Mrs. Raskin, did not know what it was all about.

When Mr. Anderson discovered that Mr. Hambleton had been in an accident he insinuated that Mr. Hambleton had left with a redhead. Mrs. Raskin stated that naturally she thought it was a woman and that although Mr. Anderson did not actually say it was a red headed woman, she was certain he meant a red headed woman.

(Testimony of Mrs. Henry Raskin.)

Mrs. Raskin recalls Mr. Anderson asking Mrs. Hambleton if she had an attorney and stating that he could help her if she would tell him who the attorney was, insinuating that Mrs. Hambleton was trying to get a divorce which she wasn't. During the course of the conversation, Mr. Anderson quizzed Mrs. Hambleton in regard to a Mr. Bennett but Mrs. Hambleton knew him by a different name and that this conversation extended until about 8:00 in the evening.

During the course of the conversation, Mrs. Raskin asked Mrs. Hambleton if she did not want some of her medicine and that Mrs. Raskin obtained some medicine for her. While Mrs. Hambleton was taking the medicine, Mrs. Raskin told Mr. Anderson that she thought he was upsetting Mrs. Hambleton and that enough had been said. By this language Mrs. Raskin said she was insinuating for Mr. Anderson to leave and that she thought he had talked long enough to Mrs. Hambleton.

In describing what she meant by grilling, Mrs. Raskin stated that Mr. Anderson kept asking questions over and over about something that did not concern what he seemed to be out there for. After Mr. Anderson left, Mrs. Raskin figured that he had been trying to get the name of a man and if he had left town with Mr. Hambleton, and in regard to something that had happened at Fort Lawton.

Later in the evening after Mr. Anderson had left, Mrs. Raskin returned to her daughter's home

(Testimony of Mrs. Henry Raskin.)

and found her more upset than she had been on the previous occasion and that she felt it was necessary for someone to be with Mrs. Hambleton during the evenings following the interview by Mr. Anderson.

Cross-Examination

Upon cross-examination, Mrs. Raskin stated that she could not remember whether Mr. Anderson had specifically inquired about a redheaded woman or if he had merely inquired about a redhead.

During the course of this grilling, as you call it, was Mrs. Hambleton asking Mr. Anderson any questions?

A. Well, not so much as he was asking her questions and she was trying to answer them.

Q. Wasn't she entering into the conversation just as much as he was?

A. Well, when he would ask her questions, she did.

* * *

Q. You have been here all day today, have you not? A. Yes.

Q. Was her response to the questions which Mr. Anderson asked her very similar to the responses which I got from my questions today?

A. I beg your pardon?

Q. You heard your daughter testify—it is your daughter, isn't it? A. Yes.

Q. You heard your daughter testify today, didn't you? A. Yes.

(Testimony of Mrs. Henry Raskin.)

Q. Did she answer Mr. Anderson's questions about the same manner as she answered my questions today? A. Yes.

Q. Isn't it a fact that Mr. Anderson informed Mrs. Hambleton at the outset that he was not investigating Mr. Hambleton but what he was interested in was an allegation that some officer at Fort Lawton was demanding that private detectives who turned in deserters split with that officer on the reward which they received? Isn't that what Mr. Anderson explained to Mrs. Hambleton he was investigating?

A. No, he didn't explain it. He told her he was quizzing about a Mr. Bennett and about the Fort, but it seems the question was more of Mr. Hambleton than it was Mr. Bennett. [125]

Q. Didn't Mr. Anderson tell Mrs. Hambleton that he had understood that Mr. Hambleton had been required to split his rewards with Lt. Bennett and that is what he was really investigating, and that is what he really wanted to know?

A. He did ask that question, but she says, "I don't know nothing about that".

Q. Isn't it a fact that Mrs. Hambleton did tell Mr. Anderson that she was familiar with all of Mr. Hambleton's work? A. Yes.

Q. Wasn't he trying to determine something in regard to whether or not Mr. Hambleton had been turning in deserters and collecting a reward?

A. Well, I think he referred to that.

(Testimony of Mrs. Henry Raskin.)

Mrs. Raskin testified that she and her daughter did not intimately discuss with each other their problems as neither wanted to worry the other, and the personal life of each of them was somewhat of a mystery to each other.

Mrs. Raskin did recall that a few months prior to the interview by Mr. Anderson, Mr. Hambleton had been involved in an automobile accident in which his car was almost completely demolished.

When Mrs. Hambleton returned from the Crown Hill Hospital, she could not remember all the things that had happened before she had gone to the hospital. After a week or so she did recover her memory so that she could upon being questioned remember things. Within a month after she came out of the hospital she had recovered about as much of her memory as she had at the time of the trial.

End of Mrs. Raskin's testimony

The stipulation which is Exhibit A-7 was introduced in evidence, and the plaintiff rested.

Upon the conclusion of the plaintiff's evidence, the defendant made an oral motion for dismissal which is set out as follows on pages 151 and 152 of the Transcript of Testimony.

Mr. Evans: The defendant at this time moves for dismissal, Your Honor. The defendant challenges the evidence of the plaintiff. There has been no showing here that there has been any tort committed. There has been no showing of any wrong done to the plaintiff's person or property. Under the decisions that have been cited in my memorandum, I believe it is a prerequisite to recovery that there be a physical wrong either to the person or to the property of the plaintiff.

I don't believe there has been any tort shown here whatsoever. The most that has been shown is that the mother insinuated at one time that Mr. Anderson leave. There is no testimony at all that he was ever specifically requested to leave. There is no showing here of any violation of any of the rights of the plaintiff whatever.

Under the laws of the State of Washington as set down in the decisions by our Supreme Court, I don't believe there is a recovery under the law of the State of Washington. I have covered this rather thoroughly in my memorandum of authorities, and I do not wish to take up any more time at this time unless the Court would care to hear me further.

The Court: The challenge is overruled and the motion is denied.

Defendant may now proceed with defendant's case in chief.

* * *

(Opening statement made by counsel for defendant.)

* * *

CAPTAIN WILLIAM L. ANDERSON

Direct Examination

Captain Anderson testified that he was presently a captain in the United States Army in the Counter Intelligence Corps and was presently assigned as an instructor in the Counter Intelligence Center at Camp Holabird, Maryland; that this institution was the service school for the Counter Intelligence Corps of the United States Army. He testified that on January 21, 1948 he held the rank of Master Sergeant in the United States Army and was assigned as an investigator for the Criminal Investigation Division of the United States Army stationed at Fort Lewis, Washington.

Captain Anderson testified that United States Army Field Manual 19-20 (Exhibit A-3) and War Department Circular 276 (Exhibit A-5) were official War Department publications and that they dealt with the function and duties of the Criminal Investigation Division agents. Captain Anderson stated that his duties as instructor at the Counter Intelligence Corps center involved teaching the contents and application of these publications. Exhibits A-3, A-4 and A-5 were admitted to evidence.

Captain Anderson testified that he holds an L.L.B. degree from Suffolk Law School in Boston and that prior to entering the Army he had worked for the

(Testimony of Captain William L. Anderson.)
Employers Liability Assurance Corporation of
London as an investigator.

Captain Anderson testified that Exhibit A-3, Field Manual 19-20, is literally the "Bible" of Criminal Investigation Division investigators as to how to operate.

Captain Anderson testified that the Army had received information that certain military personnel at Fort Lawton had been demanding from certain individuals dealing with the Army, a split in the reward usually granted to persons bringing in deserters or AWOL's under military control and it was this violation which he was investigating at the time he interviewed Mrs. Hambleton. Captain Anderson testified:

A. I called Mrs. Hambleton for the purpose of making an appointment and she inquired, of course, who I was and what I wanted, and I told her I was Mr. Anderson and that I was representing the Army, and she inquired, "Well, what would you like to see me about," and I told her, "I can't talk over the telephone but I would like to arrange to see you," and she kept insisting, "Well, what is it about? Why do you want to see me". Again I repeated that I couldn't tell her over the telephone, that I had some information regarding her husband and that perhaps she could give me some information.

So she said, "Well, you won't be out for an hour, will you", and I said, "No, whatever time is convenient for you", so she said, "I'll be ready after

(Testimony of Captain William L. Anderson.)
about an hour." I said, "All right, but I haven't the slightest idea where your street is, because I am not familiar with Seattle," and she gave me directions as to how to get out to, I believe it was eight thousand something 35th St., S.W., and that was the gist of the conversation.

* * *

Captain Anderson testified that he left Fort Lawton just before five o'clock in the afternoon of January 21, 1948, to go to Mrs. Hambleton's house and that he was delayed in arriving there because of the five-o'clock traffic in the City of Seattle. He estimated it took him approximately $\frac{3}{4}$ of an hour from the time he left Fort Lawton until he arrived at Mrs. Hambleton's home. He further testified that he was in civilian clothes at the time as he was authorized to be. Upon arriving at Mrs Hambleton's home he was invited in by Mrs. Hambleton who was completely dressed in what he recalled as a dark blue suit. Captain Anderson displayed his credentials which was an identification card. This identification card was admitted in evidence as Exhibit A-2.

Captain Anderson stated that he told Mrs. Hambleton that he was investigating a report that certain military personnel at Fort Lawton had been demanding a split in the rewards given to detectives and other police officers for returning AWOL's and deserters to military control. He further advised her that in his investigation he had found that Mr. Hambleton had turned in several deserters

(Testimony of Captain William L. Anderson.)

and AWOL's to military control. He stated that he wanted to know if Mrs. Hambleton could give him any information as to military personnel at Fort Lawton having demanded that Mr. Hambleton split this reward with them. Mrs. Hambleton stated she had no knowledge of any such activities.

Captain Anderson further testified that he advised Mrs. Hambleton that according to the Fifth Amendment to the Constitution she was not required to give him any information whatsoever and further that if she did not want to talk with him she did not have to. However, Mrs. Hambleton was very friendly and was willing to cooperate.

Captain Anderson further testified that he told Mrs. Hambleton he would like to have an interview with her husband whom he understood was in Lovelock, Nevada, and that he would like to know when he would be back so that he could arrange such an appointment.

Mrs. Hableton kept questioning Captain Anderson as to how he knew Mr. Hambleton was over in Nevada. At about this point in the conversation Mrs. Hambleton received a telephone call. Captain Anderson did not know who the call was from. However, after the telephone conversation Mrs. Hambleton seemed to be a little belligerent, stating to Captain Anderson that he should tell her all about her husband being over in Lovelock, Nevada; that the woman she had just talked to had told her that Mr. Hambleton was being held on a grand

(Testimony of Captain William L. Anderson.)

larceny charge in Nevada. Mrs. Hambleton kept stating that since Captain Anderson was representing the United States Army he knew all about what was going on in Nevada and that he should tell her. Mrs. Hambleton stated that she had received a telephone call from the sheriff's office inquiring about whether her husband owned the car he was driving at the time of the accident in Nevada. Mrs. Hambleton continued to press Captain Anderson for such information stating that she was deeply upset about not knowing what was going on in Nevada as it concerned her husband.

Shortly thereafter Mrs. Raskin arrived at the home of Mrs. Hambleton. Thereafter Mrs. Hambleton received a telephone call from her husband in Nevada.

Mrs. Hambleton asked Captain Anderson if he knew a soldier by the name of Johnson who had gone to Nevada with Mr. Hambleton. Captain Anderson inquired as to whether he was a redhead. As soon as Captain Anderson mentioned the word redhead Mrs. Hambleton began to question him as to why he would say redhead and wanted to know if he meant redheaded woman. When Mrs. Raskin arrived Mrs. Hambleton told her that Captain Anderson was there for the purpose of determining whether or not any military personnel at Fort Lawton had been forcing Mr. Hambleton to split the rewards with them and that she, Mrs. Hambleton, had been unable to give him any information. Mrs.

(Testimony of Captain William L. Anderson.)

Hambleton advised her mother that Captain Anderson thought there was a redhead involved. Upon hearing this statement Mrs. Raskin told her daughter that if this was another one of those episodes it was going to be the last one. Mrs. Raskin then asked Mrs. Hambleton if she had taken her medicine that day and upon receiving a negative reply obtained medicine for Mrs. Hambleton. While she was giving Mrs. Hambleton her medicine Mrs. Raskin stated that Mrs. Hambleton was having a great deal of trouble and that her husband was the cause of it all. Mrs. Raskin then advised Captain Anderson that Mrs. Hambleton had just had an operation for a peptic ulcer and that Mr. Hambleton had kept Mrs. Hambleton in a constant state of nervousness. Then Mrs. Hambleton stated that Mr. Hambleton had very bad drinking habits and in addition he ran around. Mrs. Hambleton further stated that at times her mother had to bring food over to the house for herself and the children and at times had had to help make payments on the house. Captain Anderson further testified that Mrs. Hambleton stated that she had enough against Mr. Hambleton to sue him for non-support at any time.

Captain Anderson testified that he had made another appointment which he intended to keep after his interview with Mrs. Hambleton but that his interview with Mrs. Hambleton had taken so much time he did not believe he would be able to keep it. Captain Anderson asked permission to use Mrs.

(Testimony of Captain William L. Anderson.)

Hambleton's phone and upon calling the number of the party with whom he had a later appointment Mrs. Hambleton recognized the number as being that of a former client of Mr. Hambleton's who had had a redheaded girl working for her. This telephone call seemed to worry Mrs. Hambleton considerably as well as Mrs. Raskin and Captain Anderson was again questioned as to what he knew about Mr. Hambleton and what was going on in Nevada.

Prior to Mrs. Raskin's statement that Mrs. Hambleton had had an operation, Captain Anderson had no knowledge of such.

Captain Anderson testified that he made an official report of the entire investigation and that said report was made on January 27, 1948. That portion of the report which pertains to the interview with Mrs. Hambleton was admitted in evidence as defendant's Exhibit A-6. Captain Anderson testified that he had no knowledge of any claim against the Government because of his interview with Mrs. Hambleton until approximately two months after the interview. Captain Anderson further testified that Exhibit A-6 is an exact copy of that portion of his official report which pertains to the interview with Mrs. Hambleton.

Captain Anderson testified that proceedings were never instituted involving the subject matter of his investigation. Captain Anderson testified that he was at the home of Mrs. Hambleton approximately one and one-half hours.

TESTIMONY OF DANIEL CURRIE, JR.

Mr. Currie testified that he is a Special Agent for the Federal Bureau of Investigation assigned at Seattle and that his duties are in the nature of a supervisor; his specific assignment being that of Special Assistant in Charge of the Seattle office.

Mr. Currie stated that on or about January 19, 1948, the Seattle Office of the Federal Bureau of Investigation received a communication from their Salt Lake Office that the sheriff from Lovelock was inquiring as to the ownership of the vehicle which Mr. Hambleton was driving at the time of the accident. Mr. Currie further testified that he found the number for Mr. O. E. Hambleton in the telephone book and called that number. A lady answered the telephone and identified herself as being Mrs. Hambleton. Mr. Currie advised her that he was calling for the purpose of eliminating any possibility of an unreported car theft, that their car had been in a wreck on January 18, and that Mr. Hambleton, according to the FBI report, was in the hospital and he wanted to make sure that the person identifying himself in Nevada as Mr. Hambleton was in fact Mr. Hambleton and that the car did belong to Mr. Hambleton. Mrs. Hambleton stated that Mr. Hambleton was the man who owned the car and that he was in Lovelock, Nevada.

TESTIMONY OF CAPTAIN
ROBERT F. JONES

Captain Robert F. Jones testified that he is a Captain in the United States Army, Corps of Military Police; that he is presently stationed at Fort Lewis Washington, as Chief Agent of the 61st Criminal Investigation Division Detachment. That in such capacity he is custodian of the official report submitted by Captain Anderson and dated January 27, 1948, in regard to an investigation of 1st Lt. Robert E. Bennett. Captain Jones further testified that Exhibit A-6 was an exact copy of that portion of such report which dealt with Captain Anderson's interview with Mrs. Hambleton and that he had prepared such true exact copy and had certified that it was such.

TESTIMONY OF LT. COL.
ROBERT J. BERNUCII

Col. Bernucii testified that he is a Lieutenant Colonel, Medical Corps, U. S. Army, and that he is a qualified and licensed medical doctor having graduated from Detroit College of Medicine in 1927. He testified that at the present time he is the Chief in Neuropsychiatry at Madigan General Hospital. Col. Bernucii testified that the purpose of an electroshock treatment is to cause the patient to forget the conflicts which have been causing them their emotional disturbances. When the patient forgets the emotional conflicts which produce the mental illness it leaves the patient normal. If the shock

(Testimony of Lt. Col. Robert J. Bernucii.)

therapy is successful and the patient is cured, he will seldom remember the psychic trauma which produced the mental illness and the things which occurred prior to the shock. Gradually over a period of time the memory does return, although it may be spotty, eventually it does return. There are, however, some things which the patient can never recall.

The Colonel testified that there is no way medical science can accurately determine what causes the psychosis. The witness further testified that in the study of psychosomatic medicine it is felt that about two-thirds of gastric disorders, including peptic ulcers, are associated with emotional disorders.

Q. From your experience with electric shock treatment, will you state whether or not a person who has gone through electric shock treatment is likely to remember the specific things that might have caused their psychosis?

A. I doubt that very much.

* * *

In regard to determining what causes a psychosis, the witness testified as follows:

The Witness: I see. Well, all I can do is reiterate that a psychosis is produced by a long series of events, a long series of trauma that happens to that individual throughout life, that may be from early childhood. Now, we have mentioned certain precipitating factors, but we cannot put our finger on those and say that they are the cause. As I have

(Testimony of Lt. Col. Robert J. Bernucii.)

stated before, there are the three factors that have to be taken into consideration: the patient's own personality or biological makeup, just how much stress they can stand; their life history and the things that have happened to them through life; and then the precipitating stress, whatever that may be.

Q. Is there any way that one can tell in advance whether or not any given individual is going to go over into a psychosis or not upon a certain given set of circumstances?

A. No, sir.

* * *

TESTIMONY OF MR. A. D. NUNN

Mr. Nunn testified that he was a private investigator residing in the City of Seattle; that he was personally acquainted with Mr. Hambleton, one of the plaintiffs in this action and that upon one occasion Mr. Hambleton had made a remark that Mrs. Hambleton took a very dim view of his drinking and of the detective profession because he had to work so much at night. He further testified that on that particular occasion, Mr. Hambleton stated he had better go home before he took another drink or he would be in the "dog house."

TESTIMONY OF DUFFY HAMBLETON

Duffy Hambleton testified that he is the son of Mr. and Mrs. Hambleton, the plaintiffs in this action and that he is 13 years old. The witness testified in regard to fixing the time which Mr. Anderson arrived for his interview with Mrs. Hambleton and fixed the time at approximately 4:15 to 4:30 in the afternoon. This witness further disputed the testimony of Mr. Anderson as to how Mrs. Hambleton was dressed. He stated that she was wearing a bathrobe or housecoat at the time. The witness further stated that it was about 8:00 when Mr. Anderson left after the interview.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

Copy received March 22, 1950.

STANLEY C. SODERLAND,
Atty. for Plaintiffs, Appellees.

[Endorsed]: Filed Feb 21, 1950, U.S.D.C.

[Endorsed]: Filed Mar. 27, 1950, U.S.C.A.

DEFENDANT'S EXHIBIT A-1

John B. Riley, M. D.
Psychiatry and Neurology
721 Cobb Building
Seattle 1, Washington
Seneca 1335

February 14, 1948

Dr. F. E. Flaherty
Stimson Building
Seattle, Washington

Dear Dr. Flaherty:

Thank you for referring Mrs. Elizabeth Hambleton to me. She was rather disturbed when seen in the office, so I promptly put her in the sanatorium and started a course of electric shock treatments. She recovered quite rapidly temporarily, with perfect insight. However, she almost immediately relapsed to some extent, but considering everything, I feel that she is progressing as well as can be expected. This appears to be a catatonic type of schizophrenia.

There was a most unusual inciting factor present as a contributing factor in producing this psychosis. A private detective grilled her for 4½ hours, threatened her, told her malicious lies about her husband, etc. This instance obviously took place and can be substantiated by reliable witnesses. This was apparently of sufficient psychic trauma to produce a psychosis, whereas marriage and three children had not been able to. Therefore, I feel that her

future should be much better than the average schizophrenic.

Sincerely yours,

/s/ JOHN B. RILEY,
M.D.

JBR:ms

Admitted Nov. 4, 1949.

[Endorsed]: Filed March 28, 1950, U. S. C. A.

DEFENDANT'S EXHIBIT A-5

Cir 276
12513

War Department
Washington 25, D. C., 11 September 1946

Effective until 11 March 1948 unless sooner rescinded or superseded.

Section

Criminal Investigation Program—Responsibilities and procedures..... I

Signal Center Reports—Data on operations... II

I. Criminal Investigation Program

1. General. The Criminal Investigation Program has been established to provide efficient and effective investigation of crime within the Military Establishment. The Director of Personnel and Administration, War Department General Staff, is charged with responsibility for the Criminal Inves-

tigation Program. Acting for him, the Provost Marshal General will exercise staff supervision over the Criminal Investigation Program.

2. Primary Responsibilities. The primary responsibility for the operation of this program in continental United States rests with Commanding Generals, Army Air Forces, armies in zone of the interior, and Military District of Washington, and oversea responsibility rests with commanding generals, theaters, independent commands, and Alaskan Department. This responsibility is normally discharged by the provost marshal of the command concerned who will designate a chief of criminal investigation for the command.

3. Function. The chief of criminal investigation on the staff of the provost marshal of a command, designated pursuant to paragraph 2, is responsible for the following functions:

a. Maintenance of close supervision, direction, and control over criminal investigation activities within the command.

b. Maintenance of such records and reports as prescribed by the War Department.

c. The selection, assignment, and transfer, within the command, of criminal investigators.

d. Rendering of maximum criminal investigative assistance to posts, camps, stations, and other military installations within the command and the temporary assignment of specialists in criminal investigation to subordinate commands to meet unusual circumstances.

e. Coordination and cooperation with local governmental agencies and local officers of appropriate federal agencies.

f. Supervision and direct control over the issuance of criminal investigators' identifications and badges.

g. Supervision and control over the expenditures of special funds in accordance with pertinent finance regulations governing project 416.

h. Supervision over the wearing of civilian or other special clothing by criminal investigators in the performance of their duties.

i. Authority to decide requirements and locations of civilian type automobiles for use of investigators.

4. Personnel. The operating and supervisory criminal investigation personnel will be selected from military and civilian personnel who meet minimum qualifications. Classification of an individual as a qualified criminal investigator will be based upon one of the following, with special emphasis upon good character, dependability, and above average intelligence:

a. Investigative experience in civilian or military life. This experience may include police work, credit investigations, claim adjustments, local, State, or Federal investigative duties, military or naval investigative duties, commercial investigations, and similar vocations. In each instance the period covered, the exact extent of the experience and the proficiency attained must be considered.

b. Completion with satisfactory grade, of an investigator's course at a recognized military or civilian school. Here, consideration must be given to the application of instruction received to field work and practical experience in the actual conduct of investigations.

c. Demonstration of ability by successful investigation of cases in actual practice. Past records and recommendations of immediate supervisors are determining factors in this category.

d. Possession of latent capabilities by reason of legal training, natural bent, enthusiasm, reasoning powers, or other qualities which indicate that the individual under consideration should develop into a competent investigator. Selection is made in these cases by the use of good judgment and the ability to analyze and evaluate correctly the potentialities of the man under consideration.

5. Duties. Criminal investigators are charged with the following duties:

a. Investigating and reporting on crimes committed by military personnel and civilians subject to the Articles of War.

b. The collection and preservation of all evidence of crime affecting the army.

c. The prevention and suppression of crime within the Military Establishment.

d. In cooperation with the proper civil officials, the investigation of crime committed against the Army or by military personnel against civilians. This mission requires the establishment of liaison

and the maintenance of cordial relations with established local law enforcement agencies, and cooperation with all governmental agencies concerned.

e. Recovery of lost, stolen, or abandoned Government property.

f. The apprehension of military personnel, and civilians subject to the Articles of War, who have committed crimes.

g. The distribution of information to appropriate commanding officers concerning crimes committed by personnel of their commands.

h. The preparation of surveys of ports, docks, warehouses, depots, Army exchanges, and transportation facilities with recommendations to reduce or eliminate larceny and misappropriation of Government food, clothing, equipment, and supplies. The surveys are limited solely to crime prevention and the apprehension of criminals.

6. Cooperation With Bureau of Narcotics. It is the responsibility of the Bureau of Narcotics, United States Treasury Department, to prevent the illegal use or sale of narcotics. All evidence of the use or sale of narcotics by military personnel will be reported to the nearest office of the Bureau of Narcotics immediately upon discovery. All commanders will comply with requests of appropriate agencies of the Bureau of Narcotics for the assistance of military personnel in obtaining evidence of narcotics transactions involving members of the Military Establishment.

7. Cooperation With Bureau of Customs. It is the responsibility of the Bureau of Customs, United States Treasury Department, to prevent the illegal importation into the United States of goods and property. Upon the request of the War Department, the Bureau of Customs examines packages mailed by members of the armed forces abroad to friends and relatives in the United States to ascertain whether the packages contain items of stolen United States property. The Commanding Generals, Army Air Forces, armies in continental United States, and Military District of Washington are directed to—

a. Establish liaison with the collectors of customs within the geographical limits of their respective commands.

b. Request notification by customs officials when examination of a mailed package discloses articles which are, or are believed to be, United States Army property.

c. Obtain a complete description of the United States property; the name, rank, Army serial number, organization, and address of the sender; and the name and address of the addressee.

d. Upon determination that the articles in question are Government property, request customs officials to release the articles to military authorities. The military authority concerned will promptly turn the articles over to the nearest post, camp, or station to be picked up in accordance with instructions applicable to property found on the station as prescribed in TM 38-403, Station Supply Procedure.

e. Transmit to the Provost Marshal General, Attention, Provost Division, Washington 25, D. C., a report in duplicate of the information required by c. above.

8. Cooperation With Secret Service. It is the responsibility of the Secret Service, United States Treasury Department, to prevent the illegal manufacture and use of United States currency. All evidence of the manufacture or use of counterfeit moneys by military personnel will be reported to the nearest office of the Secret Service immediately upon discovery. In the event there is no local office of Secret Service, particularly in oversea theaters, all evidence will be forwarded to the Provost Marshal General, Washington 25, D. C., for coordination with Secret Service. All commanders will comply with requests from appropriate agencies of the United States Treasury Department for assistance in investigating counterfeit money transactions or other illegal handling of negotiable government instruments, involving members of the Military Establishment.

9. Cooperation With the Federal Bureau of Investigation and Other Federal Investigative Agencies. When the investigation of an offense committed under the jurisdiction of a military commander discloses that civilians are involved either alone or jointly with military personnel and ultimate prosecution by Federal civil authorities is indicated, and when the commanding officer concerned determines that the circumstances require investigation by other than military authorities, the

United States attorney and the nearest office of the Federal Bureau of Investigation will be immediately advised. Thereafter, in the event Federal investigating agencies undertake an investigation, the fullest possible cooperation will be accorded. The results of any investigation conducted by the military authorities will, in such cases, be made available to the Federal investigating agency. Attention is directed to paragraph 5b, AR 600-355, as changed which provides for the delivery to civil authorities of military personnel under certain specified conditions and for certain crimes or offenses committed within continental United States. Attention is also directed to War Department letter (AG 250.4 (30 Jan 46) OB-S-SPJGJ-WDOUS-M) 30 January 1946, Trial of Persons for Murder or Rape in Violation of Article of War 92, which provides that court-martial trials for such offenses committed within the geographical limits of the United States will not be held except upon special authorization of the Secretary of War.

10. General Instructions. In order that the operations of criminal investigators may be as efficient and effective as possible, all personnel are directed to observe the following general instructions:

a. Criminal investigators' identifications and badges will be honored in the official performance of their duties at all times and in all places irrespective of the military rank of the person being investigated or of the investigator.

b. Full cooperation will be afforded investigators at all times in the official performance of their duties and they will be addressed as "Mister" or "Agent," and will not at any time be required to reveal their military rank, except by competent authority in line of command.

c. Criminal investigators normally are separately billeted and messed from other military personnel. They are normally accorded the privileges of officers' messes in the performance of their official duties.

d. Where possible criminal investigators should be given complete freedom of movement within their respective commands and under unusual circumstances or emergencies may travel into other commands. Care should be exercised to report their presence to appropriate authorities of commands visited, either in advance or as soon as expedient after entry into the command.

e. Carrying of fire-arms by criminal investigators is authorized only in the performance of their official duties.

f. Criminal investigators have the same authority of arrest as military police. Attention is directed to paragraphs 83, 84, and 85, FM 19-20 and paragraph 6, FM 19-5.

g. With respect to criminal investigation, all class I and II installations and activities in continental United States are under the jurisdiction of the army area or Military District of Washington in which geographically located.

11. References. a. FM 19-20, 30 April 1945 Criminal Investigation.

b. Chapter 6, FM 19-5, 14 June 1944 Military Police.

c. Articles of War 2, 12 through 16, and 54 through 96.

12. Rescissions. This circular supersedes the following circulars and letters which are rescinded:

a. Army Service Forces letter (SPX 250.1 (24 Feb 44) OB-S-SPMGR-M) 4 March 1944, Cooperation with the Bureau of Narcotics, United States Treasury Department.

b. Army Service Forces letter ((16 Mar 45) SPDC) 24 March 1945, United States Army Property Mailed into the United States by Members of Armed Forces Abroad, as amended by Army Service Forces letter (SPXMP-M-012.41 (14 Feb 46) SPMGR) 18 February 1946, same subject.

c. War Department letter (AGOB-C 333.5 (20 Mar 45)) 26 September 1945, Investigations by the Federal Investigative Agencies.

d. War Department letter (AGMP-M 250.1 (13 Jul 45) OB-C-SPMGO) 11 August 1945, Criminal Investigation Activities within the Military Establishment.

e. Section II, ASF Circular 329, as amended by section I, ASF Circular 332, 1944.

f. Section I, ASF Circular 383, 1945.

(AG 250.1 (30 Aug 46))

Admitted Nov. 8, 1949.

DEFENDANT'S EXHIBIT A-6

Details:

Confidential

Criminal Investigation Report Re: Lt. Bennett.

Details:

20. 21 Jan 48 Mrs. O. E. Hambleton, 8312 35th St. South West, Seattle was interviewed. This agent asked her if she knew where her husband was. She said in Lovelock, Nevada. He went there with a former soldier, whom she thought little of, by the name of Garland Johnson. This agent asked her if he was a "red head." She asked why a "red head," and continued to question along these lines. I told her I wasn't interested in Mr. Hambleton's activities but was interested in whether he ever mentioned being required to give or split any of the reward he received with any military personnel. She said that she had never heard of it and felt that she would know because he always told her about his cases. She continued to worry about the "red head" I had injected into the conversation. She then took some medicine that was given her by her mother who came in during the interview. This agent then learned that she had just came out of the hospital about 2 weeks ago after a major operation for peptic ulcer. This agent was careful not to upset the woman after learning of her illness. She said this condition was brought on by her husband keeping her in a nervous state. He drank to excess frequently and she couldn't trust him. She then said that Garland Johnson had phoned her

Sunday morning, 18 Jan 48 and told her Hambleton and he, Johnson had a little accident that he was O.K. and not to worry. She received several calls but couldn't get the same story. She couldn't talk with her husband and Johnson kept giving her the run-around as to what happened and the extent of injury. He was supposed to be in a hospital in Lovelock, there was an initial report of internal injuries then later Johnson told her only cuts and bruises were involved. She wired the hospital but could not get any answer, so she didn't know what to think. I asked her if her husband was being held for any reason as a result of the accident. She did not know.

21. While this agent was present a friend phoned and told Mrs. Hambleton that she was awfully sorry about Mr. Hambleton being held on charges, she did not say what and Mrs. Hambleton pretended to know, feeling that I would tell her if it was true.

22. A few minutes later Mr. Hambleton phoned from Lovelock, Nevada. He told her he would be in the hospital for a couple of days with a bad shoulder. He would not go on to Reno as planned but would stay in Lovelock and get work. Garland Johnson was going to get him a job there. Mrs. Hambleton told him his mother was going to send him money to come home but he requested this not be done because he was staying out there for a while. She did not divulge my presence. She was very much upset about the whole situation and

asked me, if I could get information from Nevada, to please tell her, she wanted to know the worst. She had received a telephone call from the FBI who asked her if her husband owned the car he was driving, that the Sheriff of Lovelock wanted to know. She told this party that he did or at least he was up on his payments as far as she knew, because he was supposed to make one just before he left on the trip. When Johnson first phoned her about the accident he told her to notify the Insurance Co. about it which she did.

23. Mrs. Hambleton and her 3 children are finding it very difficult to get along because she is getting practically no money from Hambleton. When I told her about his AWOL business and the fact that he received \$25.00 for each apprehension she registered surprise. This agent believes she knew nothing about her husband's AWOL business. She knew Lt. Bennett, that he was married to a model and had changed his name from Crowthers for some reason but that all she did know.

24. Hambleton was very close with money. She had evidence to sue him for non-support any time.

* * *

/s/ W. L. ANDERSON,
Agent CID.

A Certified True Extract Copy:

ROBERT F. JONES,
Captain CMP.

R. R. ROSE.

Admitted Nov. 8, 1949.

DEFENDANT'S EXHIBIT A-7

In the United States District Court for the Western District of Washington, Northern Division.

No. 1984

O. E. HAMBLETON and HARRIET ELIZABETH HAMBLETON, His Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION

It Is Hereby Agreed and Stipulated by and between counsel for respective parties herein that if Col. Carol V. Cadwell were called as a witness in the above entitled cause, he would testify to the following facts:

1. That he holds the rank of Colonel in the Army of the United States and is presently assigned as Provost Marshal for the Sixth Army, and that he has held such assignment since a date prior to January 1, 1948.

2. That as Provost Marshal for the Sixth Army, he is responsible to the Commanding General of the Sixth Army for the activities of the Criminal Investigation Division within the Sixth Army area and that the State of Washington is in the Sixth Army area.

3. That he is familiar with the authorized ac-

tivities of the Criminal Investigation Division of the Army.

4. That Field Manual 19-20, a War Department publication entitled "Criminal Investigation" is the official manual covering the activities of agents of the Criminal Investigation Division.

5. That he is familiar with War Department Circular No. 276, dated 11 September 1946, Section 1, entitled, "Criminal Investigation Program—Responsibilities and Procedures"; and that such circular is the official War Department publication dealing with the Criminal Investigation program which was in effect on January 21, 1948.

6. That personnel selected for agents in the Criminal Investigation Division are required to have certain qualifications as well as aptitude for investigative work. These qualifications consist generally of experience in investigative work such as police work, credit investigations, claim adjustments, commercial investigations and similar types of work, and that the purpose of such selection is to obtain personnel who have the necessary mental qualifications to be trusted with responsibilities of carrying out an investigation once an investigative mission has been assigned.

7. When Criminal Investigation Division agents are assigned a mission to investigate a case, these agents have wide discretion as to the manner in which they will perform the investigation. There are no exact and specific orders or rules as to the

time and place and manner of interrogating witnesses. These matters are left to the discretion of the agent, it being assumed, of course, that the agent will use good judgment in exercising such discretion. By the very nature of a Criminal Investigation Division agent's work, it is impossible to accurately prescribe in advance just how he is to perform his duties with regard to interrogating witnesses, that of necessity this matter is left with the discretion of the particular agent.

8. That at the time Criminal Investigation Division agent Anderson interviewed Mrs. Hambleton he was investigating a member of the Army and not Mr. Hambleton, and in such activities C.I.D. Agent Anderson was acting within the scope of his official authority.

It Is Further Stipulated and Agreed that plaintiff reserves the right to object to the admissibility of the testimony set out herein.

Dated this 2nd day of November, 1949.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHAN E. EVANS,
Assistant United States Attorney, Attorneys for
Defendant.

/s/ STANLEY C. SODERLAND,
/s/ GEORGE R. WEST,
Attorneys for Plaintiff.

Admitted Nov. 8, 1949.

[Endorsed]: Filed Nov. 8, 1949, U. S. D. C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled court do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all the original papers in the file dealing with the above-entitled action or proceeding, including the transcript of the testimony and proceedings at the trial, together with Plaintiff Exhibits 1, 2 and 3 and Defendant Exhibits A-1 to A-7, inclusive, the same being the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the judgment filed and entered November 21, 1949, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint.
2. Praecipe for summons.
3. Summons with Marshal's Return thereon.
4. Appearance of defendant.
5. Motion of Defendant to Dismiss.
6. Memorandum of Deft. on Sec. 421(h) of Federal Tort Claims Act.

7. Ptff's Notice of Issue of Law and Note for Motion Docket.

8. Order Denying Motion to Dismiss.

9. Court Reporter's Transcript of Court's Decision on Motion to Dismiss.

10. First Amended Complaint.

11. Answer to First Amended Complaint.

12. Reply.

13. Note for Call Calendar by Plaintiffs.

14. Plaintiffs' Motion for Setting.

15. Plaintiffs' Notice of Motion.

16. Plaintiffs' Notice of Association of Attorneys.

17. Praecipe, plaintiffs, for subpoena (Lt. C. J. Williams).

18. Subpoena, (Williams) with Marshal's Return thereon.

19. Praecipe, Government, for Subpoena (Nunn).

20. Praecipe, Government for subpoenas (Flaherty and Dewey).

21. Praecipe for subpoena, (Capt. Jones) behalf Government.

22. Praecipe, Government for subpoena (Dr. Flaherty).

23. Praecipe for subpoena, Government (Bernucci, et 3).

24. Subpoena (Nunn) with Marshal's return thereon.

25. Subpoena (Riley) with Marshal's return thereon.

26. Subpoena (Flaherty) with Marshal's return thereon.

27. Subpoena (Dewey) with Marshal's return thereon.

28. Motion deft. for Leave to Amend Answer.

29. Note for Motion Docket.

30. Amended Answer to First Amended Complaint.

31. Praecipe for subpoena, (Riley) behalf plaintiffs.

32. Marshal's return on subpoena (Nunn).

33. Marshal's return on subpoena (Dewey).

34. Defendant's Memorandum of Authorities.

35. Marshal's return on subpoena (Flaherty).

36. Plaintiff's Memorandum of Authorities.

37. Defendant's Supplemental Memorandum of Authorities.

38. Plaintiff's Supplemental Memorandum of Authorities.

39. Court's Decision.

40. Notice of Presentation of Findings of Fact and Conclusions of Law and Decree of Judgment.

40-A. Bill of Costs and Disbursements to Be Taxed Against Defendant.

41. Findings of Fact and Conclusions of Law.

42. Judgment for Plaintiffs.

43. Defendant's Notice of Exception to the Entry of Findings of Fact, Conclusions of Law and Judgment.

44. Notice of Appeal, by defendant, with copy of Clerk's letter of transmittal of duplicate copy to counsel for plaintiff.

45. Motion deft. for Order Directing Issuance of Subpoena (Dr. Flaherty).

46. Order for Subpoena of Witness and Payment of Fees.

47. Motion to Extend Time for Docketing Record on Appeal.

48. Stipulation to Extend Time for Docketing Record on Appeal.

49. Order Extending Time for Docketing Record on Appeal to March 27, 1950, inclusive.

50. Praeceptum for certified copies of order for subpoena of witness (Dr. Flaherty) and payment of fees.

51. Transcript of Proceedings at Trial. (Original copy.)

52. Copy of Points to Be Relied Upon on Appeal, of appellant.

53. Copy of Designation of Portions of Record to be printed, filed by appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said district court at Seattle, this 23rd day of March, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal]: By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12513. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. O. E. Hambleton and Harriet Elizabeth Hambleton, his wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 27, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12513

UNITED STATES OF AMERICA,
Appellant,
vs.

O. E. HAMBLETON and HARRIET ELIZA-
BETH HAMBLETON, His Wife,
Appellees.

POINTS TO BE RELIED UPON
ON APPEAL

Comes now the appellant, United States of America, and states that the following points will be relied upon on appeal in the above-entitled cause:

1. The District Court erred in denying the ap-

pellant's motion to dismiss the complaint, said motion being timely made.

2. The District Court erred in finding there was any tort committed by the appellant's agent for which relief would be granted under the laws of the State of Washington.

3. There was no evidence adduced at the trial to support the Court's finding that the appellant's agent grilled the appellee and generally used emotionally distressing methods which were likely to injure her body and mind or endanger her health and the District Court erred in so finding.

4. There was no evidence adduced at the trial to support the Court's finding that the conduct of the appellant's agent was unlawful and the District Court erred in so finding.

5. There was no evidence adduced at the trial to support the District Court's finding that the appellant's agent's conduct was the proximate cause of the appellee's injuries and the District Court erred in so finding.

6. That the District Court does not have jurisdiction of the appellee's cause of action for the reason that said cause of action is within the exceptions to the Federal Tort Claims Act as set out in Section 2680, Title 28, U. S. C. in the following regard:

Subparagraph (a), the cause of action arises out of assault, misrepresentation and deceit.

Subparagraph (b), the cause of action is based upon the abuse of discretion on the part of the employee of the United States while exercising a discretionary function on the part of a Federal agency.

7. The Court erred in sustaining the appellee's motion that the witness, Harriet Hambleton, not be required to reveal the name of one of her husband's clients, her husband being a private detective as disclosed by the proceedings reported on pages 49 and 50 of the transcript of testimony.

8. The Court erred in granting judgment in favor of the appellee.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Mar. 27, 1950.

[Title of District Court and Cause.]

APPLICATION TO HAVE EXHIBITS CON-
SIDERED IN ORIGINAL FORM AND DE-
LETION OF PORTION OF EXHIBIT A-5.

Comes now the appellant, United States of America, and makes application to the Court for permission to have Exhibits A-2, A-3 and A-4 in the above-entitled cause considered by the Court in their original form rather than have the same printed as a part of the record.

Application is further made for the deletion of that portion of Exhibit A-5 from the printing of the record which does not pertain or is a part of Circular 276.

This application is based upon stipulation between the parties attached hereto.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Agreed and Stipulated by and between the parties in the above-entitled appeal through their respective counsel of record that Exhibits A-2, A-3 and A-4 in the above-entitled cause may be considered by the court in their original form without being printed in the record.

It Is Further Agreed and Stipulated that only that portion of Exhibit A-5 which pertains to War Department Circular 276 is properly a part of Exhibit A-5 and that only that portion of said exhibit which is not deleted by being marked out in red be printed as a part of the record.

Dated this 22nd day of March, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

/s/ STANLEY C. SODERLAND,

/s/ GEORGE R. WEST,
Attorneys for Appellee.

[Title of Court of Appeals and Cause.]

ORDER RE EXHIBITS

This matter having come on on application of the appellant for permission to have the Court consider Exhibits A-2, A-3, and A-4 in the above-entitled appeal in their original form and further that only that portion of Exhibit A-5 which pertains to War Department Circular 276 be printed as a part of the record and the parties to said appeal having consented to such procedure by stipulation filed herein, it is hereby

Ordered, Adjudged and Decreed that Exhibits A-2, A-3 and A-4 now on file with the Clerk of this Court be considered in their original form, and it is

Further Ordered that only that portion of Exhibit A-5 which pertains to War Department Circular 276 be printed as a part of the record.

Done this 28th day of March, 1950.

/s/ WILLIAM DENMAN,

/s/ H. T. BONE,

/s/ WALTER L. POPE,

Judges U. S. Court of Appeals
for the Ninth Circuit.

The appellees hereby consent to the entry of the foregoing order.

By /s/ STANLEY C. SODERLAND,
Counsel for Appellees.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

VS.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

FILED
JUN 26 1950

PAUL P. O'BRIEN,

No. 12513

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

VS.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the United States District Court to try this case is set out in 28 U.S.C., Section 931 (Section 1346 of the revised edition of Title 28 U.S.C.), said section being commonly known as the Federal Tort Claims Act. The jurisdiction of this

court to review the decision of the District Court is set out in Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

The plaintiffs' complaint alleges that on January 21, 1948, Sgt. William Anderson, an agent of the Criminal Investigation Division of the United States Army, interviewed the plaintiff, Mrs. Hambleton, at her home while Mr. Hambleton was absent from the city; that Sgt. Anderson was making an investigation in the course of his official duties; that he made statements and unreasonably and intentionally subjected Mrs. Hambleton to severe emotional distress in that he "grilled" her for a period of about three and one-half hours on matters about which she had no knowledge and stated to her that her husband was consorting with a redheaded woman, that he was under arrest on charges of grand larceny and drunk driving, and talked to her about getting a divorce from her husband. The complaint further alleges that as a result of this interview Mrs. Hambleton suffered a complete mental collapse and went insane for a period of over a month, requiring hospitalization and shock treatments to restore her sanity.

The defendant moved to dismiss the complaint for the reasons (1) that the alleged tort falls within

the exceptions of the Federal Tort Claims Act; and (2) that the complaint fails to state a cause of action against the United States of America. This motion was overruled.

The following is a summary of the evidence adduced at the trial. Sometime prior to January, 1948, the Criminal Investigation Division of the United States Army received reports that a certain Lt. Bennett stationed at Fort Lawton, Seattle, Washington, was demanding a "kick back" of a portion of the rewards granted by the Army to private detectives and other individuals who apprehended and returned soldiers who had deserted the Army. Sgt. William Anderson, an agent of the Criminal Investigation Division, was assigned the task of investigating the facts of the alleged misconduct of Lt. Bennett.

Anderson learned that a private detective, Mr. O. E. Hambleton, had returned several deserters to the Army authorities at Fort Lawton. Anderson decided to interview Mr. Hambleton to determine if any demands had been made upon him for "kick backs" on the rewards which he had received.

Upon learning that Mr. Hambleton was in Nevada, Anderson decided to interview Mrs. Hambleton. Anderson called Mrs. Hambleton on the telephone and after identifying himself, asked for an appoint-

ment which Mrs. Hambleton granted. The evidence is in sharp dispute as to when Anderson arrived at Mrs. Hambleton's home and when he left. The plaintiffs' evidence is that he arrived about 4:00 p. m. and left at about 8:00 p. m. on January 21, 1948, while the defendant's evidence is that he arrived about 5:45 p. m. and left about one and one-half hours later.

Mrs. Hambleton had had an operation for ulcers on November 14, 1947. But the evidence is in sharp dispute as to whether or not Anderson was aware of this fact prior to the interview.

The evidence as to what occurred during the interview is in sharp dispute. Since the plaintiff prevailed in the District Court, and it is the duty of a reviewing court to view the evidence of the prevailing party of the lower court in its most favorable light, this statement will be confined to the testimony revealed by the plaintiffs' testimony. When Anderson arrived, Mrs. Hambleton invited him in to her living room and asked him to be seated. Anderson showed her some credentials. Anderson first stated that he had some information which would be of some value to Mrs. Hambleton in obtaining a divorce from Mr. Hambleton, and that Mrs. Hambleton had some information which would be of value to Anderson. Anderson stated that Mr. Hambleton was being held

on a grand larceny charge in Nevada. Mrs. Hambleton stated that she was not interested in getting a divorce from Mr. Hambleton.

Anderson then started questioning Mrs. Hambleton as to whether she knew Lt. Bennett to which Mrs. Hambleton replied in the negative. Anderson kept insisting that Mrs. Hambleton must know Lt. Bennett and asked her the same questions over and over again. After some time Mrs. Hambleton recognized Lt. Bennett as being the same man she had known by the name of Crowthers (T. R. 56, 57).

Mrs. Hambleton complained that all during the interview, Anderson "grilled" her. Her testimony as to what actually happened and what she meant by "grilling" may be summarized as follows:

1. That Anderson was insulting in that he kept asking her the same questions over and over again, insinuating that she was not telling the truth (T. R. 44, 46, 47, 50, 51).

2. That Anderson stated or inferred that Mr. Hambleton had left town with a redheaded woman. All of which Mrs. Hambleton contends was untrue (T.R. 43, 44).

3. That Anderson insulted Mrs. Hambleton by

insinuating that her ulcers were caused by excessive drinking which was not true (T.R. 46, 51).

4. That after Mr. Hambleton called Mrs. Hambleton by long distance from Nevada, while Anderson was present, asking Mrs. Hambleton to check on the collision insurance on their automobile, Anderson stated to Mrs. Hambleton that Mr. Hambleton needed the money for a bail bond, all of which Mrs. Hambleton claims was not true (T.R. 49).

On cross examination of the plaintiffs' principal witness, Mrs. Hambleton, the following facts were elicited:

1. That Mrs. Hambleton did not consider herself under arrest during the interview (T.R. 54).

2. That Anderson made no offer or threat of force or violence of any kind (T.R. 55).

3. That Anderson made no threats that he was going to arrest Mrs. Hambleton (T.R. 55).

4. That Mrs. Hambleton did not object to answering Anderson's questions (T.R. 55, 56, 57).

5. That Mrs. Hambleton was willing to carry on the conversation with Mr. Anderson (T.R. 57, 58).

6. That Mr. Hambleton had been drinking to

excess for sixteen years and Mrs. Hambleton did not like it (T. R. 62, 52).

7. That Mrs. Hambleton could have sued Mr. Hambleton for divorce many times but never had (T.R. 66).

8. That at the time of the interview, Mrs. Hambleton was worried about Mr. Hambleton's physical condition as the result of the accident in Nevada (T.R. 52).

9. That after Mrs. Hambleton returned from the sanitarium and her sanity was restored, she remembered nothing of her past life but that gradually things have come back to her upon suggestions from other people (T.R. 59, 60, 61).

There was no testimony whatever that anyone ever asked Mr. Anderson to leave the premises.

During the cross examination of Mrs. Hambleton, she stated that during the interview she received a telephone call from a former woman client of Mr. Hambleton who told her that she had told Anderson about Mrs. Hambleton's operation. When Mrs. Hambleton was asked to reveal the name of the former client, she refused on the ground of privilege and the trial judge ruled that the witness could not be compelled to tell the name of such former client of Mr.

Hambleton in his capacity as a private detective (T.R. 52, 53, 54).

There is no dispute as to the fact that on January 28, 1948, Mrs. Hambleton appeared at the office of Dr. Flaherty who had performed the ulcer operation, and that at that time she was in a state of psychosis. There is likewise no dispute that Mrs. Hambleton was thereafter treated at Crown Hill Sanitarium for approximately a month to restore her sanity.

Dr. Riley, the neuropsychiatrist who treated Mrs. Hambleton for her mental disorder, testified at length as to her mental breakdown (T.R. 66, 67). Dr. Riley further testified:

1. That medical science is not in a position to know exactly what causes a person to go into a psychosis (T.R. 68).

2. That it is possible the interview with Mr. Anderson caused the psychosis (T.R. 70, 81).

3. That only an expert trained in neuropsychiatry could tell if a person might or might not go into a psychosis (T.R. 71, 72).

4. That no one can tell how much mental stress

a given individual can stand before going into a psychosis (T.R. 73).

5. That he had never examined Dr. Flaherty's records nor made any investigation to try to determine what could have caused Mrs. Hambleton to go into the psychosis and did not know Dr. Flaherty had treated Mrs. Hambleton for a nervous condition on January 19, 1948 (T.R. 77, 78, 79, 80).

6. That the statements set out in his letter (Exhibit 1) to Dr. Flaherty were based on information received from Mr. Hambleton and Mrs. Raskin, and not from any personal knowledge of his own (T.R. 70).

Dr. Francis E. Flaherty was Mrs. Hambleton's family physician and performed the operation on November 14, 1947. The doctor stated that Mrs. Hambleton had advised him on one or two occasions that she was nervous about her family problems or trouble with her husband (T.R. 31); and that she had indicated to him that Mr. Hambleton's use of alcohol had caused her some anxiety and nervousness (T.R. 32). On December 31, 1947, Mrs. Hambleton called upon Dr. Flaherty for a checkup as the result of her operation and at that time the doctor learned that her husband had gone on occasional bouts of drinking and that this had concerned her somewhat

(T.R. 35). On January 19, 1948, Mrs. Hambleton again called on Dr. Flaherty and at that time she was quite nervous having just received word that her husband had been involved in an automobile accident in Nevada and that his condition was critical. At that time Dr. Flaherty prescribed a sedative (T.R. 36) for Mrs. Hambleton. Dr. Flaherty did not again see or hear from Mrs. Hambleton until January 28, 1948.

The defendant introduced into evidence that portion of Sgt. Anderson's official report which covered his interview with Mrs. Hambleton (Exhibit A-6). This report was prepared and submitted on January 27, 1948. The defendant also introduced War Department Circulars and War Department Manuals showing the discretion vested in investigating agents in the performance of their duties.

The trial judge in his oral decision and written Findings of Fact found that the defendant's agent, Anderson, interrogated Mrs. Hambleton for approximately three and one-half hours and in so doing failed to use reasonably prudent methods and due care in conducting such investigation and that he grilled her excessively for an excessive length of time and on delicately personal subjects not directly connected with the investigation he was conducting and

generally used emotionally distressing methods which were likely to injure her body or mind or endanger her health (T.R. 15). The trial judge awarded the plaintiff \$5,000.00 general damages and \$552.52 special damages.

QUESTIONS RAISED

1. Does the plaintiffs' amended complaint state a cause of action under the laws of the State of Washington?

2. Do the Findings of Fact describe a tort for which the laws of the State of Washington would grant relief.

3. Is there sufficient evidence to support the court's finding that Agent Anderson grilled Mrs. Hambleton and used emotionally distressing methods which were likely to injure her body and mind or endanger her health.

4. Is there any evidence to support the court's finding that the conduct of Agent Anderson was unlawful.

5. Is there any evidence upon which the trial judge could find that Agent Anderson's conduct was the proximate cause of Mrs. Hambleton's injuries?

6. Is the plaintiff's complaint a cause of action

arising out of assault, misrepresentation or deceit?

7. Is the plaintiff's cause of action based upon the abuse of discretion on the part of Agent Anderson while exercising discretionary functions as authorized by the Department of the Army?

8. Is the relationship of a private detective and his client such that it would be improper for the trial judge to compel a private detective's wife to reveal the name of such client?

SPECIFICATIONS OF ERROR

1. The court erred in overruling the defendant's motion to dismiss the plaintiffs' complaint.

2. The court erred in finding from the evidence that a tort was committed for which relief would be granted under the laws of the State of Washington.

3. The court erred in finding that the conduct of Anderson was the proximate cause of the plaintiff's injuries.

4. The court erred in finding that the plaintiff's cause of action does not fall within the exceptions to the Federal Tort Claims Act.

5. The court erred in ruling that the witness, Harriet Hambleton was privileged not to reveal the name of a person with whom she had a telephone

conversation for the reason that the said person was a former client of her husband in his business as a private detective.

ARGUMENT ON SPECIFICATIONS OF ERROR 1 AND 2

SUMMARY

The Federal Tort Claims Act allows recovery only in cases where the laws of the state in which the act or omission occurred, would allow recovery. The plaintiff seeks recovery for mental distress unaccompanied by any invasion of her person or property. The law of the State of Washington does not allow recovery in such cases.

ARGUMENT

Under the Federal Tort Claims Act as it existed at the time plaintiffs' complaint was filed the United States is liable for torts under "circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred." The revision of Title 28, effective September 1, 1948 contains similar language.

It is the defendant's contention that neither the complaint nor the evidence adduced at the trial de-

scribes a tort for which relief would be granted under the laws of the State of Washington. Since both the first and second specifications of error deal with the same points of law, the two specifications will be argued together herein.

The plaintiffs' complaint and the evidence adduced at the trial show clearly that if the plaintiff suffered any injuries caused by the defendant's agent, Anderson, the same was caused by words alone unaccompanied by any invasion of the plaintiffs' person or property. . .

As will be shown herein the laws of the State of Washington as decided by the Supreme Court of that state do not allow recovery under such circumstances.

Barnes v. Bickle, 111 Wash. 133. The facts in this case are very similar to the facts alleged in the plaintiffs' case herein. In the Barnes case the plaintiff was renting a rooming house on a month to month tenancy from the defendant. The plaintiff had paid her rent for the month of July. On July 20, the plaintiff went to a hospital for an operation. The plaintiff left the rooming house in charge of a maid. On July 24, the maid became ill and invited the defendant to assume charge of the rooming house. The defendant notified several of the plaintiffs' roomers

that the defendant intended to remain in charge and that all rents were to be paid to the defendant. This fact was reported to the plaintiff in the hospital.

On July 26, the defendant sent a notice to the plaintiff's nurse at the hospital to the effect that on August 1, the rent would be increased from \$150.00 to \$300.00 per month, and requested that the note be delivered to the plaintiff if she was able to receive it. The notice was delivered to the plaintiff in the hospital. On August 1, the plaintiff tendered \$150.00 rent which the defendant at first refused but later accepted. On August 6, a notice of termination of the tenancy was served upon the plaintiff to be effective on September 1. The plaintiff suffered great mental anguish and her recovery was retarded, and now seeks to recover for physical and mental pain, distress and suffering.

The Supreme Court of the State of Washington denied plaintiff's recovery stating that it was apparent from the allegation in the complaint and proof in support thereof, that there was no physical invasion of the plaintiff's person. The court then went on to state:

"And since there was no physical invasion of the respondent's person, her sole claim must necessarily be, as it no doubt is, made in the com-

plaint for physical and mental distress where there was no act amounting to an assault."

The decision states further "* * * there can be no recovery for mental and physical distress where there was no invasion of the person or property of the claimant."

Stiles v. Pantages Theater Company, 152 Wash. 626. This decision cites and affirms the decision in *Barnes v. Bickle*, *supra*, as still being the law of the State of Washington. In the Stiles case the plaintiff, a seventeen-year-old girl, entered an amateur movie contest wherein the winner was to receive a trip to Hollywood. The plaintiff was the winner in the preliminary tryout and was scheduled to appear in the defendant's theater in the final contest. The manager of the defendant's theater informed the plaintiff he would not permit her to enter the final contest. The plaintiff went to the theater at the time of the final contest and attempted to prepare herself to go on the stage with the other contestants. The manager of the theater came back-stage and refused to allow the plaintiff to enter the contest. In so doing, the manager shook his fist in the plaintiff's face, swore at her and told her to get out of the theater. The plaintiff sought to recover for the resulting mental suffering caused by the acts of the theater manager.

In denying the plaintiff's right to recover the Supreme Court of the State of Washington stated in its decision:

"It seems clear to us, in the light of our prior holdings, that mere mental suffering resulting from the act of another which is not willful, in the sense of being malicious, such act being unaccompanied by physical injury caused at the same time, is not ground for recovery of damages. The law upon this subject has been reviewed in a number of our decisions and announced in substance as thus stated. See, *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, 142 Pac. 29, L.R.A. 1915B 522; *Kneass v. Cremation Society*, 103 Wash. 521, 175 Pac. 172, 10 A.L.R. 442; *Barnes v. Bickle*, 111 Wash. 133, 189 Pac. 998; *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299."

Lewis v. Physicians Credit Bureau, 27 Wash. (2d) 267, decided in 1947. In this case the Supreme Court of the State of Washington again affirms the case of *Barnes v. Bickle*, *supra*. In the *Lewis* case, plaintiff seeks to recover for mental distress caused by an invasion of the plaintiff's right of privacy. The defendant called the office of the plaintiff's wife's employer on the telephone and informed the employer that the plaintiff owed a bill which he had refused to pay, and that the defendant would institute proceedings to garnishee the wages of the plaintiff's wife. The Supreme Court of the State of Washington after denying that the complaint constituted a

violation of the plaintiff's right of privacy, if any such existed, quoted that portion of the *Stiles v. Pantages Theater* case as heretofore quoted. A recent search indicates that there have been no further decisions dealing with this subject since the Lewis case.

Corcoran v. Postal Telegraph-Cable Company, 80 Wash. 570. In this case, the plaintiff's wife dispatched a telegram to the plaintiff who was then in St. Paul, Minnesota, stating that the plaintiff's baby was very low. Due to negligence on the part of an employee of the defendant telegraph company, the message was not delivered. The baby died and was buried before the father even knew that the baby was ill. The plaintiffs sought recovery for their mental suffering. The trial court allowed recovery and the Supreme Court of the State of Washington reversed the trial court.

The opinion in this case contains an exhaustive review of cases decided both in the State of Washington and other jurisdictions touching upon the subject of recovery for mental suffering where physical injury is not involved. In reviewing the cases decided in the State of Washington, the opinion states:

"Are we correct in assuming that this court has not, in any of its decisions, expressed views at variance with the common law rule as understood and applied by the great majority of the courts

as above indicated? Let us notice our own decisions relied upon by counsel for respondents. In *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146, damages were claimed for injury to feelings and mental suffering flowing from the expulsion of a passenger from a car, unaccompanied by physical force or violence. Damages were allowed in that case to the passenger, but upon the theory that the act complained of was willful and was accompanied by duress. There was in law a physical wrong committed against the person. In *Gray v. Washington Water Power Co.* 30 Wash. 665, 71 Pac. 206, the plaintiff was awarded compensation for mental suffering on account of personal disfigurement resulting from a physical injury caused by the defendant. Manifestly, the mental suffering was inseparable from the physical. This is an example of one of the most common class of cases wherein mental suffering enters into the measurement of damages. In *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L.R.A. 802, damages were allowed the plaintiff because of the defendant's willful expulsion of her from a public park where she had a right to be. Here, again, is an example of a willful wrong accompanied by duress. In *Ott v. Press Publishing Co.*, 40 Wash. 308, 82 Pac. 403, damages were claimed by plaintiff because of his mental suffering flowing from the publishing of a libel against him. This, also, was a willful wrong, the libelous words being actionable *per se*, and tending to degrade and work financial loss to the plaintiff. In *McClure v. Campbell*, 42 Wash. 252, 84, Pac. 825, damages were allowed the plaintiff for mental suffering flowing from his wrongful eviction from premises. Here, again, the action was willful and accompanied by duress. In *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436,

damages were allowed for mental suffering flowing from a wrongful entry upon the plaintiff's premises, though no physical injury was inflicted upon her, but this also was a willful wrong, inflicted upon the plaintiff by the invasion of the sacred precincts of her home. The wrongful act was a physical invasion of the plaintiff's personal rights. In *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as willful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights."

In further considering the question, the Supreme Court stated in its opinion on Page 585:

"To attempt to fix a monetary value as damages for such suffering would be to enter the realm of speculation, as much today as it would have been fifty or a hundred years ago. The only possible ground upon which such damages could be allowed would be the ground upon which punitive damages are allowed. This thought is expressed in some degree in some of the decisions we have noticed, but it is worthy of note in this connection that punitive damages are not recoverable in this state even when the injury upon which the claim is rested flows from gross negligence or willful wrong, except when expressly allowed by statute."

It is thus clear that under the laws of the State of Washington there can be no recovery unless the mental suffering is accompanied by physical injuries caused at the time. It is elementary that a person cannot recover merely because damages have been suffered. It must be remembered that before damages can be recovered, there must first be a tort. Under the laws of the State of Washington no tort was committed by the defendant's agent, Anderson.

The only possible torts which by the farthest stretch of the imagination the plaintiffs' evidence might support are slander or assault. Slander, of course, is one of the torts specifically excluded in the Federal Tort Claim Act. Assault is likewise excluded. The decisions of the Supreme Court of the State of Washington clearly hold that unless there has been an assault, which is another way of saying injury to the person or property of the plaintiff, there can be no recovery. The plaintiff here seeks to recover on some nameless tort which is neither an assault nor slander, claiming damages for mental suffering as a result thereof. The very cogent reasons why the decisions of the Supreme Court of the State of Washington have not allowed recovery in such cases is clearly stated in the last quotation from the case of *Corcoran v. Postal Telegraph-Cable Company, supra*,

to the effect that allowing a monetary recovery for such damages enters into the realm of speculation and are not subject to being proven. It must be conceded that the testimony of the neuropsychiatrist in the case at hand indicates that medical science has still not advanced to the point where such damages and the causes thereof can be proven. The most that Dr. Riley could state is that the interview conducted by Agent Anderson could *possibly* have caused the injury.

MOTION TO DISMISS COMPLAINT

The decision of the lower court in overruling the defendant's motion to dismiss the complaint is set out on page 4 of the transcript of the record. The trial judge quoted from *Johnson v. United States* that portion which states in effect that Congress sought to relieve itself of the burden of granting relief for torts committed by employees of the Government. The trial judge had just recently been reversed by this court in that decision. The defendant has no quarrel with the language used in the Johnson decision, nor with the Tort Claims Act as passed by Congress. However, defendant does not believe that the Federal Tort Claims Act or any decision dealing with such Act has held that Congress delegated to the judicial branch of the Government the authority to grant gratuitous

relief to persons who had been injured. The Tort Claims Act and the decisions dealing with that Act confine the authority of the courts to spend the taxpayers' money in cases where the United States, if an individual, would be liable under the laws of the place where the act or omission occurred.

ARGUMENT ON SPECIFICATION OF ERROR NO. 3 SUMMARY

There was nothing to indicate to Agent Anderson that his interview would cause the plaintiff any injury. Only a trained neuropsychiatrist could tell if a person might or might not go insane from questioning. The laws of Washington allow recovery only where the defendant could foresee some danger to the plaintiff because of the defendant's acts. There is no evidence showing the interview was the proximate cause of the plaintiff's injury.

ARGUMENT

It is the defendant's contention that the court erred in finding that the conduct of Agent Anderson was the proximate cause of the plaintiff's injuries. It is the defendant's contention that a plaintiff can recover only when a tort has been committed. A tort is committed only when a person does an act or omits doing an act when a person of ordinary prudence

would have done otherwise. The decision of the Supreme Court of the State of Washington in *Severns Motor Company v. Hamilton*, 135 Wash. Dec. 571, decided February 3, 1950, supported this contention in the following language quoted from page 572 of the decision:

“A person is negligent if he does an act which a person of ordinary prudence would not have done under the existing circumstances. It is not the result of the act that is controlling, nor is the conduct to be judged by what, after injury has occurred, then appears would have been a proper precaution. The question of negligence must be determined by what would or should have reasonably been anticipated or foreseen in the exercise of ordinary prudence as likely to happen. *Burr v. Clark*, 30 Wn. (2d) 149, 190 P. (2d) 769; 1 Shearman and Redfield on Negligence (1941 ed.) 50, Sec. 24.”

In the case at hand, Dr. Riley, the neuropsychiatrist called by the plaintiff, stated that only an expert would be capable of determining whether or not an individual might or might not suffer any mental illness as a result of an interview (T.R. 71, 72) and stated further:

“Q. In other words, a common ordinary investigator going out to talk to someone, there would be nothing that would be a red flag in front of his face that this person might go insane?

A. That is right.”

In *Burr v. Clark*, 30 Wn. (2d) 149, the Supreme Court of the State of Washington defined due care in the following language:

“The duty to use care is based upon the knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor’s knowledge, actual or imputed, of the danger to another in the act to be performed. 38 Am. Jur. 678, Negligence, Sec. 32; 45 C. J. 651, 653, Negligence, Sec. 25, 27.

Ordinary or reasonable care is, as frequently expressed, that care which an ordinarily reasonable and prudent person would exercise under the same or similar circumstances. *Berglund v. Spokane County*, 4 Wn. (2d) 309, 103 P. (2d) 355; *Olsen v. John Hamrick’s Tacoma Theatres*, 9 Wn. (2d) 380, 115 P. (2d) 718, and cases therein respectively cited.

In *Ullrich v. Columbia & Cowlitz R. Co.*, 189 Wash. 668, 66 P. (2d) 853, we defined negligence and prescribed the standard for its determination by quoting with approval the following statements found in 45 C.J. 632, 660, Negligence, Secs. 2, 27:

‘A Judicial definition bringing out with admirable conciseness the elements of actionable negligence is as follows: “Negligence is an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred”.’

‘The actual result of an act or omission is not controlling in determining whether or not it was negligent, nor is the duty of the person doing or omitting an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of negli-

gence must be determined according to what should reasonably have been anticipated, in the exercise of ordinary prudence, as likely to happen.'

The rule as stated in the last-quoted paragraph was applied in *Banks v. Seattle School Dist. No. 1*, 195 Wash. 321, 80 P. (2d) 835."

Further assistance on this subject is found in *Emery v. Littlejohn*, 83 Wash. 334.

"One is not liable for his every act that may ultimately result in wrong to another. He is only responsible for that which, in the light of experience of mankind, he should reasonably anticipate as liable to happen; not that which might barely possibly happen as the result of his act. In the text of Webb's *Pollock on Torts* (enlarged Am. ed.), on page 42, the learned author observes:

"The doctrine of "natural and probable consequence" is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety

on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability.'

Similar observations are made in the text of *Negligence of Imposed Duties (Personal)*, p. 133 by the learned author, Justice Ray, as follows: 'Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things.

The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it.

The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident'."

It is difficult therefore, to see how Agent Anderson could have reasonably anticipated or foreseen in the exercise of ordinary prudence that his interview with Mrs. Hambleton would cause her any injury whatsoever. If such were the law, it is doubtful if any law-enforcement officer could ever perform his duties without rendering himself liable for mental suffering by individuals with whom he had an interview. There is scarcely a citizen, law-abiding or otherwise, who does not have some emotional distress or emotional disturbance when a law-enforcement officer calls upon them for an interview. It is the defendant's contention that under the Washington State law, so long as a Government investigator uses no threats of force or violence, or any threats of arrest, there can be no liability against such Government agent or his principal because of the words which he uses.

Viewing the plaintiff's evidence in its most favorable light, it shows that the only possible misconduct on the part of Agent Anderson is that he was insulting in asking the same questions over and over again, insinuating that Mrs. Hambleton was not telling the

truth; that Anderson insinuated that Mrs. Hambleton's ulcers were caused by excessive drinking; that he stated Mr. Hambleton had left town with a red-headed woman; and that Mr. Hambleton was being held on a charge of grand larceny and needed money for bail bond. The plaintiff contends that these acts constitute "grilling." The defendant contends that the term "grilling" implies questioning under threat of violence or bodily harm.

It should be pointed out that the plaintiff's witness under cross-examination admitted that Mrs. Hambleton did not consider herself under arrest during the interview; that Anderson made no threat that he was going to arrest Mrs. Hambleton; that Anderson made no threat of force or violence of any kind; that Mrs. Hambleton did not object to answering Mr. Anderson's questions; that Mrs. Hambleton was willing to carry on the conversation with Mr. Anderson; that Mr. Hambleton had been drinking to excess for 16 years and that Mrs. Hambleton did not like it; that Mrs. Hambleton could have sued for divorce from Mr. Hambleton many times but never did; and that at the time of the interview she was worried about Mr. Hambleton's physical condition as a result of the accident in Nevada.

Under these circumstances, it is the defendant's

contention herein that Agent Anderson had no knowledge that his actions were causing any danger to Mrs. Hambleton whatever. He committed no acts from which he could ever suspect that he was causing Mrs. Hambleton any harm whatever.

The defendant further contends that there is no causal connection between the interview and Mrs. Hambleton's later mental collapse. The evidence clearly shows that Mrs. Hambleton had been under a nervous strain for some time. Her family physician knew that Mr. Hambleton had been drinking and that Mrs. Hambleton was upset about it. Just two days before the interview, Mrs. Hambleton was in her family physician's office in such a nervous state that it was necessary for Dr. Flaherty to prescribe a sedative. There is no medical testimony of any kind which would indicate that Mrs. Hambleton would not have suffered her mental collapse were it not for the interview. The most that the neuropsychiatrist would say is that the interview could *possibly* have caused the mental collapse. The burden of proof being upon the plaintiff, how then could the trial judge make a finding of fact that the interview caused the plaintiff's injury under such evidence? The defendant contends that the trial judge should have dismissed the plaintiff's cause for failure to sustain this burden of proof.

ARGUMENT ON SPECIFICATION OF ERROR NO. 4

SUMMARY

The Tort Claims Act specifically excepts from its operation all claims arising out of assault, misrepresentation and deceit and also all claims arising out of an abuse of discretion. Under the laws of the State of Washington the plaintiff cannot recover unless his action is based on assault, misrepresentation or deceit. The duties and required qualifications of an agent in the C.I.D. of necessity require him to use his discretion.

ARGUMENT

It is the defendant's contention that the plaintiff's cause of action is either based upon assault, misrepresentation and deceit, or upon abuse of discretion on the part of a Government agent.

Section 2680, Title 28, U.S.C., Subdivision (h), specifically excludes from the operation of the Federal Tort Claims Act, any claim arising out of assault, misrepresentation, or deceit. All during the trial, the plaintiffs have specifically denied that this action is based upon assault, misrepresentation, or deceit. As has been heretofore shown, unless one of these torts was committed by the Government agent so as to satisfy the requirement of an invasion of the

plaintiffs' person or property, that the laws of the State of Washington will not allow recovery. The plaintiff, then, is in the embarrassing position of having to prove a case based upon assault, misrepresentation or deceit in order to recover under the laws of the State of Washington, and at the same time contend that his case does not fall within those categories in order to escape the exception in the Federal Tort Claims Act. It is the Government's contention that this cannot be done.

Subparagraph (a) of Section 2680, Title 28, U.S.C., states in effect that the Government shall not be liable in cases where the cause of action is based upon the abuse of discretion on the part of the employee of the United States while exercising a discretionary function. That subsection is quoted as follows:

“Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

It is the defendant's contention that the very nature of Agent Anderson's duties and the required qualifications for one acting in his capacity clearly

show that he was vested with a great amount of discretion in the course of his official duties.

The defendant introduced in evidence, War Department Circular 276 as Exhibit A-5, beginning on page 102 of the Transcript of Record. This circular sets out the criminal investigation program, its responsibilities and procedure. As stated in paragraph 3 (h) and (i) of that circular, agents of the Criminal Investigation Division are authorized to wear civilian clothes and use civilian-type automobiles in their investigations. In paragraph 4 of that War Department circular it clearly shows that the personnel selected for this type of duty shall be those who have the necessary mental qualifications to properly exercise discretion. As stated in that paragraph 4, special emphasis shall be placed upon "good character, dependability, and above average intelligence." In paragraph 5 of the War Department circular under "Duties", it will be seen that among other things the criminal investigators are charged with the collection and investigation of all evidence of crime effecting the Army. Under paragraph 10 of the circular it will be seen that investigators will carry identification which will be honored at all times and in all places irrespective of their rank, and further that they shall not be called by their military rank

but as "agent" or "mister". Subparagraph (d) of paragraph 10 further provides that agents shall have complete freedom of movement in the performance of their duties.

There was further introduced into evidence in the trial, Exhibit A-3 which is War Department Field Manual 19-20, the original of which has been filed with the Clerk of the Court of Appeals. On page 4 under subparagraphs (b) and (c) of paragraph 8, the following will be found:

"b. Criminal investigators usually operate singly or in small groups under directives which authorize considerable latitude in investigative procedure."

"c. Criminal investigators should be given special authority to go wherever necessary to complete their investigations. They should be furnished with identification cards, badges, special passes, and other credentials to permit them to carry on their work without interference, and with minimum restrictions upon their movements."

On page 21 of Exhibit A-3, the following will be found under the paragraph entitled "Objectives of an Interview":

"a. Investigators must interview every available witness to a crime or its circumstances. Since the trial judge advocate determines which witnesses will be called to testify for the prosecution at the trial and to what circumstances they will testify, the investigative report must

furnish him complete information relative to the results of the interviews of witnesses."

Counsel for the parties entered into a stipulation as to what Col. Carol V. Cadwell, Provost Marshal for the Sixth Army, would have testified to if he were called as a witness. This stipulation is Exhibit A-7 printed on pages 115 through 117 of the transcript of the record. Particular attention is invited to paragraph 7 of the stipulation wherein it is stated that Criminal Investigation Division agents have a wide discretion as to the manner in which they perform their duties.

The above evidence is not disputed anywhere in this case. It is the defendant's contention that Agent Anderson was performing a discretionary function during his interview with Mrs. Hambleton. The very nature of his duties certainly indicate that unless he was vested with wide discretion in the performance thereof, he could never accomplish those duties. Obviously, it would be impossible to carry on an interview with a witness in any prescribed manner. Of necessity, an investigating agent must ask such questions of a prospective witness as will elicit the information needed by the prosecuting authorities. It is difficult to imagine a duty which would require more discretion than that of an investigator.

Not only does the Tort Claims Act specifically except from the operation thereof, claims arising out of abuse of discretion, but also the decisions of the Supreme Court of the State of Washington have taken that view with regard to public officials. In *Emery v. Littlejohn*, 83 Wash. 334, the Supreme Court of the State of Washington announced its views on that subject in the following language:

“The acts of Dr. Calhoun here complained of being official, and calling for the exercise of his discretion, the law seems to be settled beyond controversy that he cannot be called to account for any consequences flowing therefrom, in a civil action for damages instituted by a person claiming to be injured as the result of such discretionary action, in the absence of malicious or corrupt action. It is not claimed that Dr. Calhoun acted either maliciously or corruptly. Indeed, it could not be with any show of reason under the evidence. The most that can be said is that he acted mistakenly, or for argument’s sake, we may concede that he acted negligently; but, under all the authorities, such action would not render him liable in this action, since his acts were official and involved his discretion. In the text of 29 Cyc. 1444, after noticing the law touching the immunity of judicial and legislative officers from liability in an action for damages flowing from their official acts, it is said:

‘In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion. Such officers are not liable for a mistaken exercise of such discretion. In many

of the cases on the liability of inferior judicial officers and officers discharging quasi-judicial or administrative functions, the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability. But in most cases what is said in the opinion is merely *dictum*, inasmuch as the actual decision did not recognize the liability. There are, however, a few cases which actually decide that if the act complained of has been done with corrupt motives or malice there is a liability to the person injured. On the other hand, it has been distinctly held that, if the officer whose acts are complained of keeps within his powers, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts.'

In *Kendall v. Stokes*, 3 How. 87, Chief Justice Taney, speaking for the Supreme Court of the United States, said:

'A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs.'

In *Spalding v. Vilas*, 161 U.S. 483, Justice Harlan, speaking for the United States Supreme Court, in a case where damages were sought in an action against the Postmaster General, claimed to have resulted from his official action, said:

"In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under

an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. *The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purpose of the trial, that the defendant acted maliciously, that could not change the law'.*" (Italics ours).

The quotations contained in the decision in the Littlejohn case from *Kendall v. Stokes*, 3 How. 87; *Spalding v. Vilas*, 161 U.S. 483, are still the federal law. The Supreme Court of the United States followed the principles laid down in the Kendall and Spalding cases in the case of *Yaselli v. Goff*, 275, U.S. 503. For other federal cases holding steadfastly to the principles of these cases see *Gregoire v. Biddle*, 177 F. (2d) 579, which contains a general review of

the federal cases on this subject; *Lang v. Wood*, 92 F. (2d) 211; *Smith v. O'Brien*, 88 F. (2d) 769; *Standard Nut Margarine Company v. Mellon*, 72 Fed. (2d) 557; *Brown v. Rudolph*, 25 F. (2d) 504; and *Mellon v. Brewer*, 18 F. (2d) 168.

ARGUMENT ON SPECIFICATION OF ERROR NO. 5 SUMMARY

The relationship of private detective and client is not as sacred as the relationship of attorney and client. The courts have consistently held that an attorney is not privileged to withhold the name of his client. Therefore, the trial judge was in error in ruling that the wife of a private detective was privileged not to reveal the name of one of her husband's former clients.

ARGUMENT

It is the defendant's contention that the trial judge erred in allowing Mrs. Hambleton to claim the privilege of not revealing the name of one of her husband's former clients when asked so to do upon cross-examination. Mr. Hambleton was a private detective. Mrs. Hambleton testified on pages 52 and 53 of the transcript that she received a telephone call from a former client of Mr. Hambleton and that the former client advised her that she had told Mr. An-

derson about Mrs. Hambleton's operation. This evidence goes to the proof of maliciousness on the part of Agent Anderson. It was the plaintiffs' contention that Anderson knew Mrs. Hambleton was recovering from a serious operation and that by reason of such knowledge he should have acted differently than the plaintiff contends he did. It was the defendant's contention that Anderson knew nothing of the operation until he discovered it during the interview. Mrs. Hambleton's testimony as to what a former client of her husband told her on the telephone is highly prejudicial to the Government's defense of this action. The Government was prepared to prove that the person who called Mrs. Hambleton did not make any such statement. However, unless Mrs. Hambleton revealed the name of the individual who made the telephone call, such evidence would prove nothing. Therefore, it was highly important to the Government's case that Mrs. Hambleton reveal from whom she received this telephone call.

The trial judge upon his own volition and later upon request of plaintiffs' counsel allowed Mrs. Hambleton the privilege of not revealing the name of her husband's former client.

It should here be pointed out that the fact that the person calling Mrs. Hambleton had been a former

client of Mr. Hambleton had absolutely no bearing on the case.

Private detectives have no status whatever under the laws of the State of Washington. There are no statutory provisions for their qualifications or licenses. The privilege communication provisions of the statute of the State of Washington, Remington's Revised Statutes 1214, make no mention of anything about private detectives.

Although a thorough search has been made, the appellant has been unable to find any authorities dealing with any privilege communication between private detectives and their clients. However, numerous cases were found where courts have considered whether or not an attorney can be compelled to reveal the names of his clients. The defendant contends that the relationship of attorney and client is of a much higher order than the relationship of a private detective and client and therefore if an attorney is not privileged to withhold the name of his client, then, certainly a private detective cannot claim such privilege. All of the authorities steadfastly hold that an attorney does not have such privilege.

Syllabus 1 and 2 in *Behrens v. Hironimus*. 170 F. (2d) 627, states as follows:

“The ‘privilege’ as to communication between attorney and client pertains to the subject matter, and not to the fact of employment as attorney.”

“Ordinarily, identity of attorney’s client, or name of real party in interest, and terms of the employment, will not be considered as ‘privileged communication’.”

Syllabus 3 in *Goddard v. United States*, 131 F. (2d) 220 is quoted as follows:

“The ‘privilege’ as to communication between attorney and client extends only to communications made in attorney-client relationship, and not to fact that such a relationship exists.”

The first syllabus in *Stanley v. Stanley*, 27 Wash. 570, is quoted as follows:

“The rule making communications between attorney and client privileged from disclosure on the witness stand does not apply to testimony by the attorney disclosing by whom he was employed in the management of a case.”

The 4th syllabus in *Collins v. Hoffman*, 62 Wash. 278, is quoted as follows:

“An attorney is not privileged from disclosing by whom he was employed nor the terms of the employment.”

CONCLUSION

The law of the State of Washington does not recognize and allow recovery for torts where there has been mental suffering without any invasion of the

plaintiff's person or property. The plaintiff's right to recover in this case being founded upon the Federal Tort Claims Act which allows recovery only if recovery can be had under the laws of the state where the act occurred is thus barred in this case. Since it is impossible for medical science to determine what causes a person to go insane, the court erred in finding that the plaintiff suffered her mental collapse by reason of Agent Anderson's acts. The Federal Tort Claims Act specifically excludes any possible theory upon which the plaintiff might otherwise have an action upon which recovery could be allowed. There is no possible basis upon which the court could allow privilege with regard to revealing the name of a private detective's former client.

Having fully shown to this Honorable Court the reversible errors committed by the trial judge, it is respectfully requested that this court reverse the decision of the trial judge and direct that judgment be entered for the defendant, United States of America.

Respectfully submitted,

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United States Attorney

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Assistant United States Attorney

No. 12513

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

VS.

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

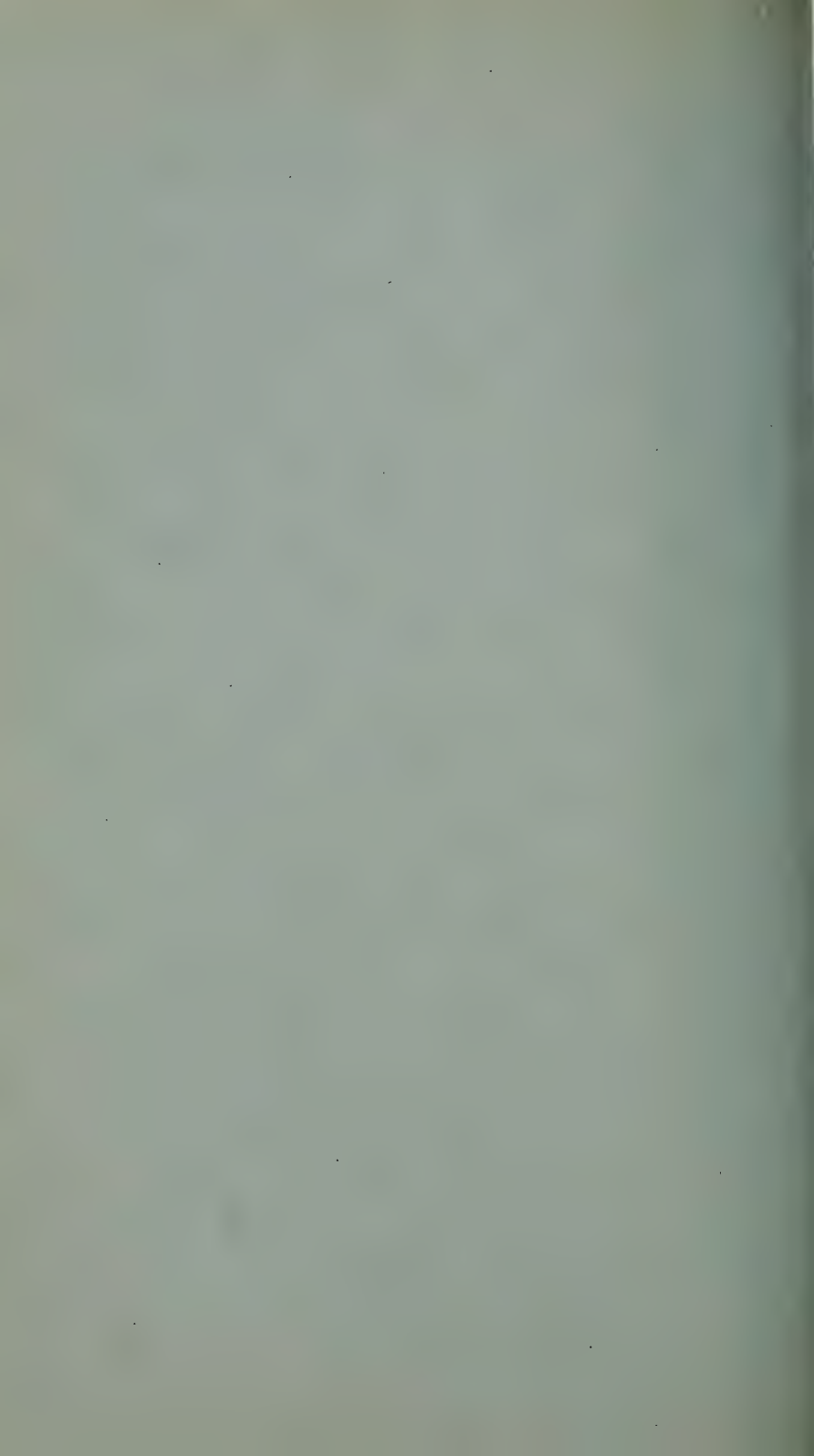
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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The plaintiffs' complaint alleges that on January 21, 1948, Sgt. William Anderson, an agent of the Criminal Investigation Division of the United States Army, interviewed the plaintiff, Mrs. Hambleton, at her home while Mr. Hambleton was absent from the city; that

Sgt. Anderson was making an investigation in the course of his official duties; that he made statements and unreasonably and intentionally subjected Mrs. Hambleton to severe emotional distress in that he "grilled" her for a period of about three and one-half hours on matters about which she had no knowledge and stated to her that her husband was consorting with a redheaded woman, that he was under arrest on charges of grand larceny and drunk driving, and talked to her about getting a divorce from her husband. The complaint further alleges that the statements made were of such nature and the continuous grilling carried on was of such a nature that William Anderson knew or should have known that the resulting emotional and mental distress were likely to result in illness and bodily harm to plaintiff, Harriet Elizabeth Hambleton, particularly in view of the fact that she was at that time convalescing from a major operation, her resistance to any emotional stress was low, and Anderson was informed of these facts and warned not to upset her; that as a result of this interview Mrs. Hambleton suffered a complete mental collapse and went insane for a period of over a month, requiring hospitalization and shock treatments to restore her sanity (T.R. 5 to 8).

The defendant moved to dismiss the complaint for the reasons (1) that the alleged tort falls within the exceptions of the Federal Tort Claims Act; and (2)

that the complaint fails to state a cause of action against the United States of America. This motion was overruled.

The following is a summary of the evidence adduced at the trial. Sometime prior to January, 1948, the Criminal Investigation Division of the United States Army received reports that a certain Lt. Bennett stationed at Fort Lawton, Seattle, Washington, was demanding a "kick back" of a portion of the rewards granted by the Army to private detectives and other individuals who apprehended and returned soldiers who had deserted the Army. Sgt. William Anderson, an agent of the Criminal Investigation Division, was assigned the task of investigating the facts of the alleged misconduct of Lt. Bennett.

Anderson learned that a private detective, Mr. O. E. Hambleton, had returned several deserters to the Army authorities at Fort Lawton. Anderson decided to interview Mr. Hambleton to determine if any demands had been made upon him for "kick backs" on the rewards which he had received. It was orally stipulated at the trial that there was no suggestion of misconduct on the part of Mr. Hambleton.

Upon learning that Mr. Hambleton was in Nevada, Anderson called Mrs. Hambleton on the telephone and after identifying himself, asked for an appointment

which Mrs. Hambleton granted. The evidence is in sharp dispute as to when Anderson arrived at Mrs. Hambleton's home and when he left. The plaintiffs' evidence is that he arrived about 4:00 p.m. and left at about 8:00 p.m. on January 21, 1948, while the defendant's evidence is that he arrived about 5:45 p.m. and left about one and one-half hours later.

After Anderson arrived and showed Mrs. Hambleton his credentials, he first stated that he had some information which would be of some value to Mrs. Hambleton in obtaining a divorce from Mr. Hambleton, and that Mrs. Hambleton had some information which would be of value to Anderson. Anderson stated that Mr. Hambleton was being held on a grand larceny charge in Nevada. Mrs. Hambleton stated that she was not interested in getting a divorce from Mr. Hambleton.

Mrs. Hambleton had had an operation for ulcers on November 14, 1948 and was still receiving medication. She testified that she so told Mr. Anderson and he claimed to be already aware of the fact (T.R. 46, 63, 65). Anderson testified he was advised by Mrs. Raskin, Mrs. Hambleton's mother, during the interview that Mrs. Hambleton had had an operation (T.R. 94). Not denied is Mrs. Hambleton's testimony that she became ill during Anderson's interrogation of her and took some medicine in his presence at the time (T.R. 45, 46,

63, 64). Anderson continued to question Mrs. Hambleton after he knew of her operation, and after the medication in his presence.

Anderson then started questioning Mrs. Hambleton as to whether she knew Lt. Bennett to which Mrs. Hambleton replied in the negative. Anderson kept insisting that Mrs. Hambleton must know Lt. Bennett and asked her the same questions over and over again. After some time Mrs. Hambleton recognized Lt. Bennett as being the same man she had known by the name of Crowthers (T.R. 56, 57).

Mrs. Hambleton complained that all during the interview, Anderson “grilled” her. Her testimony as to what actually happened and what she meant by “grilling” may be summarized as follows:

1. That Anderson was insulting in that he kept asking her the same questions over and over again, insinuating that she was not telling the truth (T.R. 44, 46, 47, 50, 51).

2. That Anderson was there so long, about four hours, and covered so few subjects (T.R. 44, 47, 54, 56).

3. That Anderson asked Mrs. Hambleton excessively repetitive questions concerning personal subjects connected with her marital affairs and not related to the person whom Anderson was investigating (T.R.

43, 44, 46). Anderson also purported to make statements of fact concerning some of these matters (T.R. 43, 44, 48, 49, 55). Some of his statements were fact, others false.

4. That Anderson insulted Mrs. Hambleton by insinuating that her ulcers were caused by excessive drinking which was not true (T.R. 46, 51).

As stated in appellant's brief on page 6, Anderson made no threats that he was going to arrest Mrs. Hambleton. However, in response to cross-examination, when asked the question whether Anderson did anything that would lead her to believe he would use force or had the means of using force to obtain any information from her, Mrs. Hambleton replied, "Well, I can answer that yes, for the simple reason he knew so much about our business that I was afraid he would bring pressure through what he knew of our files, because they were in strict confidence and when I figured that he knew what was in those files that were supposed to be confidential, I figured that he could use those over us for information. I figured that a Government man could do that if it became necessary to get information from someone" (T.R. 55).

On cross-examination, Mrs. Hambleton testified that after she returned from the sanitarium everything came back a little at a time. It is clear from her testi-

mony that her memory was clearly restored relative to the subject matter of her testimony (T.R. 59, 60, 61).

Appellant's brief states there was no testimony whatever that anyone asked Mr. Anderson to leave the premises. However, Mrs. Raskin told Anderson that her daughter was upset and had answered enough questions (T.R. 58, 84).

As mentioned in appellant's brief, during the cross-examination of Mrs. Hambleton, she stated that during the interview she received a telephone call from a former woman client of Mr. Hambleton who told her that she had told Anderson about Mrs. Hambleton's operation. When Mrs. Hambleton was asked to reveal the name of the former client, she was reluctant to do so. The trial judge ruled that the United States Attorney had invited hearsay, could object to it but could not use hearsay to build up an opportunity of having a name disclosed (T.R. 53, 54).

Mrs. Hambleton's interrogation by Mr. Anderson was on January 21, 1948. Immediately prior to that she was a patient of Dr. Francis E. Flaherty, convalescing from an operation necessitating the removal of three-fourths of her stomach but not manifesting any abnormal or psychotic tendencies whatsoever to her doctor's observation (T.R. 27).

On January 23, 1948 Mrs. Hambleton appeared at

the home of Lt. Clarence J. Williams. She talked in tangents and was generally incoherent. She refused a bottle of Coca-Cola, fearing it was poison (T.R. 82).

On January 25, 1948, Edwin A. Golder, a Seattle police officer and friend of the Hambletons, saw her. She appeared to be upset and he knew immediately that something was wrong. She was definitely not herself (T.R. 82, 83).

On January 28, 1948, she revisited Dr. Flaherty, who believed she was then definitely suffering from a mentally disturbed condition. He determined she had been going almost without food or water; had a fear of eating; thought she had been drugged; and refused a "sort of Vitamin B" prescribed by the doctor to make up a deficiency because of lack of proper nourishment (T.R. 29, 30, 37, 38). On January 28, 1948, he made arrangements for her to see Dr. John B. Riley, a neuropsychiatry specialist (T.R. 30).

Dr. Riley first saw Mrs. Hambleton on January 31, 1948. He immediately placed her in Crown Hill Sanitarium for approximately one month to restore her sanity. There she was administered a combination of ten electroshocks and insulin treatments. He testified at length concerning her insanity but stated that after her treatments and release from Crown Hill Hospital her memory had improved and she was outwardly essen-

tially normal (T.R. 66, 67).

Dr. Riley was asked:

Q. Could a protracted period of persistent questioning with grilling constantly recurring on a point which a person had denied, to have it constantly thrown back to them over a period of time, could that, coupled with knowledge that it was Government official who was carrying on that grilling, cause such an emotional disturbance as might cause an injury such as she sustained?

A. It could have, yes (T.R. 68).

Dr. Riley further testified, as stated in his letter which is Exhibit A-1, in his opinion, threats, worries and interrogation are what caused Mrs. Hambleton to become insane (T.R. 71).

He said that the injury she suffered was more than mental illness. It was a definite psychosis; that grilling on top of a major operation would make her more prone to develop trouble, than if she hadn't had the operation (T.R. 69, 81).

The trial judge in his oral decision and written Findings of Fact found that the defendant's agent, Anderson, interrogated Mrs. Hambleton for approximately three and one-half hours and in so doing failed to use reasonably prudent methods and due care in conducting such investigation and that he grilled her excessively for an excessive length of time and on deli-

cately personal subjects not directly connected with the investigation he was conducting and generally used emotionally distressing methods which were likely to injure her body or mind or endanger her health (T.R. 15). The trial judge awarded the plaintiff \$5,000.00 general damages and \$552.52 special damages.

In the portions of the brief to follow, Mrs. Harriet Elizabeth Hambleton will frequently be referred to as appellee.

ARGUMENT

- I. The tort here committed is one for which recovery is allowed under the laws of the State of Washington.

In Specifications of Error, Numbers 1 and 2, appellant contends that the law of the State of Washington does not allow recovery for the injury here suffered. Appellant claims that, "the plaintiff seeks recovery for mental distress unaccompanied by any invasion of her person or property" (App. Br., p. 13); and further that if any injury was caused it was "caused by words alone unaccompanied by any invasion of the plaintiff's person or property" (App. Br., p. 14).

Appellant is doubly in error in its position; and herein lies the basis for distinguishing the cases cited by appellant. Appellee's action was not to seek recovery for mere mental distress, but for physical and mental

injuries in the form of actual serious, bodily illness, to-wit, a complete mental collapse and insanity requiring hospitalization and medical treatment for approximately one month, and shock treatments with all the pain and suffering incident thereto. Furthermore, those injuries were not caused by words alone as appellant states, with no invasion of her person or property. They were caused by extended interrogation and excessive grilling and emotionally distressing methods which were unreasonable, imprudent and likely to cause injury.

The cases cited by appellant relate to mental suffering and mental distress. Those cases are not in point where the injury is insanity, a bodily illness of a very real sort. The reasoning of those cases wherein the court is reluctant to allow recovery under certain circumstances for mental distress is that the injury is "more sentimental than substantial" and the "difficulty of estimating a pecuniary compensation for mental anguish." See *Corcoran vs. Postal Telegraph-Cable Co.*, 80 Wash. 570. Furthermore, mental anguish is subjective and not subject to positive proof. Such reasons do not stand in the way of allowing just compensation for the very real injury of being driven insane.

Appellant's entire argument rests on a failure to distinguish insanity from mental anguish. This is an apt example of the tyranny of labels. Merely by includ-

ing both insanity and mere mental distress under the label of mental suffering or mental distress, appellant seeks to apply cases on mental anguish or distress in a situation involving physical well-being, to-wit, insanity.

No case has been cited by appellant and none could be found by appellees where the Supreme Court of the State of Washington has held that insanity is an injury for which no recovery can or should be allowed. This is in fact a case of first impression under the laws of the State of Washington. Logically, however, there is a very real distinction between mental distress, which involves mere peace of mind, and insanity, which concerns one's physical well-being and is as real an injury as any other illness. And general law on the subject permits recovery in just such a case as this.

Here the trial court found that Anderson unreasonably subjected appellee to emotional distress. The facts of this case bring it directly within the applicable general rule set forth in the Restatement of Torts.

Restatement of Torts, Negligence, Vol. II, ch. 12, Sec. 312, p. 847.

“Sec. 312. If the actor intentionally or unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for all illness or other bodily harm of which the distress is a legal cause,

- (a) Although the actor has no intention of inflicting such harm, and
- (b) Irrespective of whether the act is directed against the other or a third person.”

Emden v. Vitz, 88 Cal. App. (2d) 313, 198 P. (2d) 696, allowed recovery in a case very similar on its facts. Plaintiff was a tenant in defendants' apartment house. Defendant “yelled and screamed at plaintiff, saying the O.P.A. could not run the property” while another defendant “shook some papers at her, saying: ‘You haven't got an apartment here, we will select our own tenants!’ ” As a result, plaintiff suffered emotional distress which caused her “to suffer an upset to her glandular condition, causing shortness of breath, pains about the heart, nervousness, headaches, loss of sleep, and inability to carry on her normal activities.” Medical testimony showed that she suffered a “very serious” condition caused by “some sort of upset or emotional experience.”

That court recognized that the law has been reluctant to protect “one's peace of mind or emotional tranquility as such,” but stated that the interest involved in the case and universally protected was “the interest in physical well-being.” In thus recognizing the distinction between mental distress and physical injury to the mind or nervous system, the court stated:

“if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.”

That court stated further:

“The evidence justified a conclusion that defendants intentionally and unreasonably subjected plaintiff to severe mental distress involving a risk of causing physical harm; and by clear and uncontradicted evidence, it was proven that substantial physical injuries were actually incurred by plaintiff as a proximate result of fright engendered by the said conduct of defendants. Liability under these circumstances is manifestly correct.”

Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299, did not involve insanity but it did involve a recognizable effect on plaintiff's health resulting from emotional distress caused by defendant. Where there is such injury to bodily well-being, the Supreme Court of Washington allows recovery for emotional or mental distress caused by a defendant. The case involved a dispute over a funeral bill; the defendant undertaker threatened to hold the body of her son, just died, until the old bill was paid. Plaintiff thought her son had already been cremated and was just recovering from the grief. The court said:

“Upon receiving this information, her condition became so aggravated that she became sick and lost some ten or fifteen pounds in weight, and the shock materially affected her health.”

The Court held this was a willful wrong and recovery should be allowed for mental suffering unaccom-

panied by physical violence. The court quoted 8 Ruling Case Law 531:

“In cases of willful and wanton wrongs and those committed with malice and an intention to cause mental distress, damages are, as a general rule, recoverable for mental suffering even without bodily injury, and though no pecuniary damage is alleged or proved. And in general, damages for mental anguish or suffering are recoverable where the act complained of was done with such gross carelessness or recklessness as to show an utter indifference to the consequences where they must have been in the actor’s mind.”

Clark v. Associated Retail Credit Men, C.C.A., D.C., 105 F (2d) 62, recognizes that modernly recovery is allowable for mental injury which results in physical injury. The following quotations are in point:

“The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress . . .”

“But the law has long given redress, in some circumstances, for intended mental harm without more”

“For a long time the assault cases stood practically alone; but in recent years an analogous principle has begun to develop. Several cases in which there was no physical harm and no assault have allowed recovery for intended mental harm which was serious enough so that it might have been found that defendant’s acts had created a risk of physical illness”

“In the present case the shock which defendant intentionally inflicted not only risked, but actually caused, physical harm. In such circumstances, recovery has repeatedly been allowed”

“No one has a general license purposely to injure the bodies of others. That mental means are used can be no excuse”

It is noteworthy that the court in the above case relied in part upon *Gadbury v. Bleitz*, 133 Wash. 134, 233 Pac. 299. The law of Washington clearly allows recovery where the mental distress actually causes injury to plaintiff's physical well-being.

The Washington cases cited by appellant merely are not in point. *Barnes v. Bickle*, 111 Wash. 133, denies recovery for “mental and physical distress,” the court saying in its opinion that “the gist of the complaint is for physical and mental distress.” *Stiles v. Pantages Theater Company*, 152 Wash. 626, denies recovery to a girl excluded from a movie contest, saying that “mere mental suffering” and no physical injury was involved. *Lewis v. Physicians Credit Bureau*, 27 Wn. (2d) 267, concerns the right of privacy only. *Corcoran v. Postal Telegraph-Cable Company*, 80 Wash. 570, involves only mental suffering and no physical injury. None of these cases detracts from the rule of *Gadbury v. Bleitz*, 133 Wash. 134, which allows recovery where plaintiff suffers injury to her physical well-being. That is the rule applicable here where insanity resulted.

Furthermore, a recovery would be proper here under the law of Washington even if this plaintiff suffered only a mental injury, since the conduct of defendant's agent was willful and wanton. Recovery is permitted for mere mental distress if the invasion of plaintiff's rights is committed with an intention to cause mental distress or with such recklessness as to show an indifference to consequences. *Wright v. Beardsley*, 46 Wash. 16; *Gadbury v. Bleitz*, 133 Wash. 134; *Corcoran v. Postal Telegraph-Cable Company*, 80 Wash. 570; *Stiles v. Pantages Theater Company*, 152 Wash. 626. The evidence here indicated that Anderson was intentionally or wantonly causing emotional distress to appellee to induce her to give him information he sought, with a reckless indifference to consequences.

And in any event, the evidence here showed actual physical illness resulting directly from and at the time of the grilling conducted by defendant's agent. The law is clear from all the cases that recovery even for mental distress is allowable when accompanied by physical injury. Appellee had just recovered from a major stomach operation and the evidence showed that, in conjunction with the emotional upset, she suffered physical illness as a result of the grilling and had to take medicine while it was going on.

Appellee sustained further actual physical injury and suffering as a result of the emotional upset by her

refusal to eat immediately after the occurrence and the consequent starving of her body and nutritional deficiency for which the doctor treated her immediately. Many such manifestations of the psychosis caused real physical pain and suffering.

II. The finding of proximate cause is amply supported by the evidence.

In Specification of Error Number 3, appellant attacks the finding of the trial court that the injury proximately resulted from defendant's grilling. There is, of course, the obvious presumption in favor of the finding of fact of the trial court if there is any substantial evidence to support it.

Appellant argues both that defendant's agent could not reasonably have foreseen the injury and that there was in fact no causal connection between the grilling and the mental collapse.

It must first be remembered that the conduct of defendant's agent toward appellee were intentional acts. He intended to conduct himself exactly as he did. We are not concerned with his negligent or careless inadvertent acts. He is presumed to intend the natural and probable consequences of his intentional acts. And if he intentionally causes emotional distress which he should recognize as likely to cause *any* illness or bodily harm, he is liable for *all* bodily harm which does result

in fact. Restatement of Torts, Negligence, Vol. II, Ch. 12, Sec. 312, p. 847.

There is ample evidence to support the finding of the trial court. Anderson knew of appellee's recent operation and that she was suffering distress; she was becoming upset and had to take medicine while he questioned her and yet he persisted. It is clear from the evidence that he was intending to upset her in the hope of getting information more readily. He was intentionally and wantonly disturbing her on delicately personal subjects concerning her marital affairs and her husband. He repeated questions excessively over an unreasonable length of time. It is this combination of factors which Dr. Riley testified was likely to cause such an injury as this.

Whether or not Anderson acted intentionally to cause harm, what were his motives and what he should reasonably have foreseen, are questions for the trier of the facts. *National Life & Accident Ins. Co. v. Anderson*, 102 P (2d) 141.

The above case also holds that recovery is proper for mental or nervous shock where physical injury results.

There is ample evidence to support the finding that Anderson's conduct was in fact the cause of the injury. The unbroken chain of progression from the emotional

upset to the psychosis which is outlined in the Statement of the Case can leave little doubt as to the actual causation. The medical testimony was that such an event could very well cause the insanity and that some such emotional upset was necessary to cause it. The evidence showed no other factor which could have caused it.

The medical testimony as to causation which was upheld in *Emden v. Vitz*, 88 Cal. App. (2d) 313, 198 P (2d) 696, was much the same as we have here. The doctor there testified that the condition was caused by "some sort of upset or emotional experience." That court further pointed out that the injury was just as real whether caused by a blow or through some action on the mind.

III. This case is not within the exceptions of the Federal Tort Claims Act.

In Specification of Error No. 4, the appellant contends that Anderson's words and acts in relation to appellee were within the exceptions of the Act and that therefore there can be no recovery here, specifying the exceptions of assault, misrepresentation and deceit, or upon abuse of discretion on the part of a government agent.

Categorically, this case does not come within any of those exceptions to the Federal Tort Claims Act. As

earlier shown, the law is clear in the State of Washington that recovery may be had for an injury such as this even though no physical impact or actual assault was involved. Anderson knew appellee was already physically ill. She took medicine in his presence. He knew that she was becoming emotionally and mentally disturbed. These would have been caveat to a prudent man but Anderson persisted in his grilling. By his repetitive questions and insinuations, his true statements and some false ones, he tried to break her down. His every word was deliberately calculated to cause such emotional and mental stress that the cumulative effect would create such stress of mind and emotion that she would breach the trust she had in her husband and his work and betray them to the defendant. The evidence justifies the conclusion that Anderson intentionally and unreasonably persecuted the plaintiff to severe mental distress involving a risk of causing physical harm which did result in substantial measure. This was a willful legal wrong but by and large it is not the stuff of physical assault.

Nor can an action based on such conduct be said to rest on charges of misrepresentation or deceit. The gravamen of plaintiff's complaint was the above-mentioned conduct of Anderson and his acts calculated to cause the emotional upset which did occur.

In its argument that the Government shall not be

liable in cases where the cause of action is based upon the abuse of discretion on the part of the employee of the United States while exercising a discretionary function, defendant contends that Agent Anderson's duties vested in him a great amount of discretion in the course of his official duties. Reference is made to War Department Circular 276 as Exhibit A-5, beginning on page 102 of the Transcript of Record and to Exhibit A-7 printed on page 115 through 117 of the Transcript of Record. Conceding the contents thereof it is difficult to imagine a Government agent or employee the exercise of whose duties do not involve a degree of "discretion". All drivers of Government vehicles must exercise discretion of considerable degree and yet the reported cases are replete with instances of Governmental liability for their negligence or abuse of discretion.

In his oral opinion the trial judge clearly distinguished the present case from the type to which the "discretionary function" exemption applies. He said:

"The principle, in my opinion, is like that which applies to the malpractice of a surgeon, who may in his honest discretion operate or not operate, but if he does so, he must apply to such operation that professional skill which is ordinarily applied by reasonably competent surgeons. For his failure to do so, he is liable to the patient for any proximately resulting injuries and damages.

So here, even if Sergeant Anderson exercised discretion as to whether or not he should interrogate

Mrs. Hambleton, he was, after deciding to do so, bound to apply reasonably prudent methods, use due and ordinary care, and to refrain from excessive grilling and any and all other emotionally distressing methods of interrogation likely to injure her body or mind or endanger her health, but Sergeant Anderson did not act within that principle. On the contrary, he grilled Mrs. Hambleton for an unreasonably long time and put to her excessively repetitive questions concerning delicate personal subjects connected with her husband's marital and personal misconduct not related to the person whom Sergeant Anderson was investigating."

Cerri v. United States, 80 F. Supp. 831, involves the case of a soldier acting under general orders and regulations to protect all government property in view and to arrest all persons causing disorders near his post of duty. He asked a motorist to move his vehicle. The motorist did so, returned to the soldier, struck him and then ran. The soldier shot his pistol at his fleeing assailant and in doing so injured an innocent bystander. Under the law of California, in which state the action arose, the shooting of a pistol at a mere misdemeanor constituted a use of greater force than was necessary or justifiable and hence was negligence towards the injured party. The court ruled, the fact that the soldier used greater force than was necessary and so became guilty of negligence did not place his act outside the scope of his employment. Clearly the case is in point in that it involved an abuse of discretion similar to that in the instant case.

Kendrick v. United States, 82 F. Supp. 430, presents the type of "discretionary function on the part of a federal agency" discussed under the provisions of Section 2680, Title 28, U.S.C., Subsection (a). In that case the manager of a Veterans Administration Facility discharged a war veteran from further hospitalization for his mental condition. It was there held that the manager of the hospital, and by the same token, the United States, could not be held liable for the death of one who was subsequently killed by the veteran on the grounds that the manager was negligent in releasing him. The Court said:

"The performance by *executive officers of discretionary governmental duties intrusted to them by statute is not subject to judicial review.*" (Italics are ours).

Santana v. United States, 175 F. (2d) 320, was a case in which the federal district court had jurisdiction of an action under the Federal Tort Claims Act of the heirs of an honorably discharged member of the armed forces for his wrongful death allegedly caused by employees of the United States at a hospital to which the deceased had been admitted for treatment; in that said employees failed to take any reasonable measures to care for and/or treat the said patient.

It is obvious that the matter before the court now is in point with *Cerri v. United States*, *supra*, and *San-*

tana v. United States, supra. Clearly, both of those cases can be said to involve an abuse of discretion on the part of government agents and yet in both it was held that the actions were cognizable under the Federal Tort Claims Act. The abuse of discretion on the part of an employee of the government while exercising a discretionary function on the part of a federal agency mentioned in Section 2680, Title 28, U.S.C., Subsection (a) is the type of discretionary function discussed in *Kendrick v. United States*, supra, and is not at issue before the court at this time.

IV. The trial court did not commit reversible error in ruling that appellee did not have to disclose a certain name.

Appellant's Specification of Error No. 5 alleges error in refusing to compel appellee to disclose a certain name.

The testimony of appellee and the colloquy of judge and counsel on this point at pages 52 to 54 of the Transcript show that no error was committed. Appellee was testifying in response to questions by Government counsel. When asked who a certain phone call was from, appellee stated that she would rather not give the name and then proceeded to volunteer the hearsay testimony as to what the lady said. Government counsel did not try to stop the witness, did not object to the hearsay and did not move to strike the answer as hearsay or as not

responsive. Instead, counsel again persisted in asking the lady's name. The court rules that counsel did not have to indulge the hearsay and that he could not elect to let the hearsay stand for the purpose of building up a supposed need for the having the name disclosed.

The ruling of the trial court was obviously correct. If Government counsel had moved to strike the improper testimony it would have been granted. The court merely refused to let counsel use that improper testimony as a straw man to find an excuse to meet it. The only conceivable error could be a denial to Government counsel of a right to meet and cross-examine certain testimony. Appellant's brief says they were prepared to disprove the hearsay. When the court invited counsel to remove that very testimony from the case or to keep it out as not responsive to his own questions, counsel elected to indulge the hearsay. Counsel cannot complain that he was denied a right to meet that testimony which he could have removed completely.

It is clear from the trial judge's rulings that he was respecting appellee's wishes as to disclosing the name since there was no proper legal need for disclosing it. Government counsel has only created an artificial need. Accordingly, appellant's argument as to privilege is not in point. The legal question as to privilege only becomes pertinent if otherwise relevant and vital testimony is

excluded on that ground.

Furthermore, the question of admitting into evidence the name of a woman who allegedly made a hearsay statement on a collateral point brought out on cross-examination is not such a substantial point as would require reversal of a case tried to the court without a jury.

CONCLUSION

Appellee suffered a serious bodily injury in the form of a complete mental collapse requiring medical treatment and hospital care and causing great pain and suffering. That injury was caused by conduct of defendant's agent wherein he wilfully and wantonly caused her emotional distress which was likely to injure her body or mind or endanger her health. The insanity followed immediately and directly after the emotional upset with no intervening cause. The trial court properly so found on the basis of substantial evidence. The tort committed is not covered by any of the exceptions in the Tort Claims Act and recovery for the injury was properly allowed under the laws of the State of Washington. The judgment should be affirmed.

Respectfully submitted,

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
VS.

O. E. HAMBLETON and HARRIET
ELIZABETH HAMBLETON, his wife,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

Before answering the arguments of the appellees as set out in their brief, it is believed that it will be of assistance to the Court to analyze the facts and evidence in this case.

In the appellant's original brief we reviewed the testimony which was most favorable to the appellees without any particular analysis of the evidence which gave rise to the summary statement of the case. The analysis of the transcript of the testimony of Mrs. Hambleton and her mother, Mrs. Raskin, does not support the allegations of the complaint, nor the statements of fact upon which the appellees rely. The evidence, likewise, does not sustain the trial judge's findings of fact.

It is alleged in the complaint in Paragraph III (T. R. 6) that Mr. Anderson grilled Mrs. Hambleton "on matters concerning which she had no knowledge and with which she had no connection." The only evidence presented on this subject is found starting on Page 56 of the Transcript of Record where Mrs. Hambleton states, "He kept asking me over and over if I knew Lt. Bennett, and I kept telling him no, and he kept asking me again, until finally we decided the party he was talking about had a different name that I knew him by." The testimony of Mrs. Hambleton, which goes on from that point through Pages 57 and 58 of the transcript, clearly indicates that it was necessary for Mr. Anderson to continue to interrogate Mrs. Hambleton in order to determine that she actually did know Lt. Bennett, but that she knew

him under the alias of Crowther. It is plain that Mrs. Hambleton did have knowledge of Lt. Bennett and did tell Mr. Anderson she was familiar with his business. This evidence clearly negatives the allegation of the complaint as above stated since Mrs. Hambleton did have knowledge of the matters about which Mr. Anderson was making his investigation. The complaint alleges that Mr. Anderson "grilled" Mrs. Hambleton and the Court made a finding of fact to that effect. The only evidence of "grilling" is Mrs. Hambleton's statement to the effect that Mr. Anderson asked the same questions over and over again. However, as heretofore pointed out, the repetitive questions were necessary to obtain from Mrs. Hambleton the information which she had in her possession but was withholding, either intentionally or inadvertently, from Mr. Anderson. It should also be pointed out to the Court that Mrs. Hambleton was willing to carry on the conversation (T.R. 57, 58). The appellant contends that in the absence of any threats of force, violence, or arrest, that this does not sustain any finding of fact that Mr. Anderson "grilled" Mrs. Hambleton.

Much stress is laid on the conclusion stated by Mrs. Hambleton that Mr. Anderson insulted her by insinuating that her ulcers were caused by excessive

drinking. This insinuation is not borne out by the evidence. Mrs. Hambleton's testimony concerning the ulcers and drinking is found on Page 46 of the Transcript of Record wherein Mrs. Hambleton sets out the conversation which led to her conclusion. All Mr. Anderson stated was, "Well, you know what I take," referring to his own ulcers. From this statement, Mrs. Hambleton jumped to the conclusion that Mr. Anderson was accusing her of being a drunkard and that her ulcers were caused from such debauchery. It is obvious from this unwarranted assumption and conclusion stated by Mrs. Hambleton that she was so obsessed with the evils of drinking, from having lived with a drunkard for sixteen years (T. R. 62), she immediately thought Mr. Anderson was speaking of excessive drinking as the cause of her ulcers. In her testimony on Page 46, Mrs. Hambleton started a sentence with the words, "This ulcer was caused—" but then changed to another subject and did not finish the sentence. Undoubtedly, Mrs. Hambleton was about to tell the Court that her ulcers were actually caused by the nervous anxiety of living with a drunkard for sixteen years but caught herself just in time.

There is another allegation in the complaint to the effect that Mr. Anderson accused Mr. Hambleton

of consorting with a redheaded woman. Presumably, the Court was referring to this allegation in the findings of fact wherein the Court referred to "statements on delicate, personal subjects, not directly connected with the investigation." A careful examination of the testimony of Mrs. Raskin shows that Mr. Anderson did not say "redheaded woman" but asked if Mr. Hambleton had left Seattle with a redhead. Mrs. Raskin testified that Mr. Anderson insinuated that Mr. Hambleton had left with a redhead and that she naturally thought it was a woman. Although Mr. Anderson did not actually say it was a redheaded woman, she was certain it was a redheaded woman. It was undoubtedly natural for both Mrs. Hambleton and Mrs. Raskin to jump to this conclusion in the light of their knowledge of Mr. Hambleton's conduct (T.R. 83).

Further, the testimony of Mrs. Hambleton and Mrs. Raskin is erratic and inconsistent. First Mrs. Hambleton, and then her mother, admitted that it was news to Mr. Anderson when they told him that Mr. Hambleton was in Nevada and that he had been in an accident. However, they chose to say that they believed he knew enough about the trip to insinuate that Mr. Hambleton was with a redheaded woman and that he was being held on criminal charges in

Nevada. The following is quoted from Mrs. Hambleton's testimony on Page 42 of the Transcript of the Record:

"Q: Did he explain how your husband got to Nevada?

A: No, he didn't. He didn't know about my husband being gone at first. I think he was more or less trying to find out where my husband was when he came in, and then he asked me if I knew where he was, and I said, 'Yes, I know where he is' and he wanted me to tell him, and I said, 'I have to be careful who I tell where my husband is because of the type of business he is in'."

The summary of Mrs. Rankin's testimony on Page 83 was worded as follows:

"When Mr. Anderson discovered that Mr. Hambleton had been in an accident * * *."

If, by their own testimony, Mrs. Hambleton and Mrs. Raskin believed Mr. Anderson knew nothing of the whereabouts of Mr. Hambleton, or of his accident, it is difficult to see how Mrs. Hambleton jumped to the conclusion that he was giving her information that her husband was being held on grand larceny charges. Mrs. Raskin gave no testimony that she had heard Mr. Anderson say Mr. Hambleton was being held on grand larceny charges.

The testimony of Mrs. Raskin throws further light upon the unwarranted assumptions which both

Mrs. Hambleton and Mrs. Raskin made as to what Mr. Anderson was insinuating. According to Mrs. Raskin's testimony she drew the conclusion that Mr. Anderson was insinuating Mrs. Hambleton was trying to get a divorce when Mr. Anderson asked Mrs. Hambleton if she had an attorney (T.R. 84). If Mr. Anderson did ask this question, it was a natural question to ask a woman whose husband had been in an accident in another state. Again, the conclusion that Mr. Anderson was advocating a divorce when he mentioned the word "attorney," was a natural result of the witnesses' knowledge of Mr. Hambleton's conduct since Mrs. Hambleton admits she had grounds for divorce many times but did not go through with it (T.R. 66). The word association of both women reveals the story of Mrs. Hambleton's married life and the unquestionable cause of her ulcers and mental breakdown:

Ulcers	Drink
Redhead	Woman
Attorney	Divorce

This is the testimony upon which the trial Judge based the finding of fact that Mr. Anderson subjected Mrs. Hambleton to "repetitive questions on delicate, personal subjects, not directly connected with the subject he was investigating." It is admitted that the testimony was confusing, and probably purpose-

fully made confusing to the Judge, but there is not one word in the transcript to support the trial Judge's finding of fact in this case.

In addition to the unwarranted assumptions and conclusions which the witnesses drew from Mr. Anderson's statements, there is another fact which had a very important bearing upon the validity of the testimony of the appellees' witnesses. The original complaint which is on file with the clerk of this Court and set out in the appendix herein, was sworn to by Mr. Hambleton on April 30, 1948, about two months after Mrs. Hambleton was discharged from the hospital. Mr. Hambleton was not present at the time of Mr. Anderson's interview with Mrs. Hambleton which is the subject of this lawsuit. Mrs. Hambleton testified that when she came out of the hospital she could not remember the details of the interview with Mr. Anderson about which she testified (T.R. 60) and, further, admits that she did not remember any of the details of the interview until after the matter was called to her attention by her neighbors. These questions by the neighbors did not take place until after the F.B.I. was investigating the case (T.R. 61). Since there was no case to investigate prior to April 30, 1948, it is obvious that Mr. Hambleton did not obtain the information for his allegations from Mrs.

Hambleton but from the conclusions Mrs. Raskin drew from the conversation between Mrs. Hambleton and Mr. Anderson which she overheard. It is obvious from reading Mrs. Raskin's testimony (Tr. 83 to 87) that Mr. Anderson did not say that Mr. Hambleton had left with a redheaded woman, that Mr. Anderson did not advocate a divorce, and that Mr. Anderson made no statements about Mr. Hambleton's being held on charges of grand larceny and drunken driving. In fact, Mrs. Raskin testified (T.R. 84) that "after Mr. Anderson left, Mrs. Raskin figured that he had been trying to get the name of a man and if he had left town with Mr. Hambleton, and in regard to something that had happened at Fort Lawton."

In the complaint and in the Court's findings of fact there are further statements to the effect that Mr. Anderson's conduct caused Mrs. Hambleton physical and mental injury. The evidence does not support any finding that Mrs. Hambleton sustained any physical injury of any nature during the course of the interview. Undoubtedly, the appellees rely upon the testimony to the effect that Mrs. Hambleton took some medicine while Mr. Anderson was present to sustain the finding of physical injury. A careful analysis of the testimony shows that Dr. Flaherty prescribed some medicine for Mrs. Hambleton to take daily dur-

ing her convalescent period (T.R. 34). On Page 84 of the transcript Mrs. Raskin states that she asked Mrs. Hambleton if she did not want some of her medicine and that Mrs. Raskin obtained some of the medicine for her. On Pages 63 and 64, counsel for the appellees sought to have Mrs. Hambleton testify that the questioning by Mr. Anderson caused her physical injury. Even with leading questions and by putting answers in the mouth of the witness, the counsel was unable to make the witness testify to such a fact. Mrs. Hambleton only stated that she just took the medicine because Dr. Flaherty had prescribed it.

From this testimony it is obvious that there was no physical injury inflicted upon Mrs. Hambleton. She was already upset and nervous on the 19th of January and Dr. Flaherty had prescribed medicine for her to be taken at regular intervals. Certainly, no logical inference can be drawn in that testimony relative to Mrs. Hambleton taking her medicine which would support any finding that there was any physical injury.

In analyzing the testimony there is another example of Mrs. Hambleton drawing an unwarranted inference from what actually happened. On pages 54 and 55 of the transcript the testimony is recorded

as to what actually occurred which gave rise to Mrs. Hambleton's conclusion that she was being "grilled".

One of the questions asked and the answer given is as follows:

"Q. Did he do anything that would lead you to believe that he would use force or had the means of using any force to obtain any information from you?

A. Well, I can answer that yes, for the simple reason he knew so much about our business that I was afraid he would bring pressure through what he knew of our files, because they were in strict confidence, and when I figured that he knew what was in those files that were supposed to be confidential, I figured that he would use those over us for information. I figured that a Government man could do that if it became necessary to get information from someone."

The conclusion drawn by Mrs. Hambleton that a Government man could use Mr. Hambleton's files to force information from Mrs. Hambleton is entirely a matter of wild speculation, not based on any statements made by Anderson. This is but one example of Mrs. Hambleton's unlimited imagination from which she has drawn the unwarranted conclusions that she was being "grilled", that Anderson was advocating a divorce, that Anderson was insulting, and that he was accusing Mr. Hambleton of consorting with a redheaded woman.

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATIONS OF ERROR 1 AND 2

In Specifications of Error 1 and 2 the appellant contends that the trial Judge erred in overruling the appellant's motion to dismiss the appellees' complaint and also the Court erred in finding from the evidence that a tort was committed for which relief would be granted under the laws of the State of Washington.

In answer to the appellant's argument on these specifications of error, the appellees first seek to convince the court that there was a physical injury "not caused by words alone." The appellees seek to prove that insanity resulting from an emotional and mental disturbance is a physical injury. Even if this play on words had some foundation in fact and even if Mr. Anderson's actions were the cause of the mental illness, Mrs. Hambleton's trouble arose from the use of words alone. There is not one iota of proof of any invasion of her person or property. In the appellees' brief it is argued that extended interrogation and excessive grilling and emotionally disturbing methods, which were unreasonable and imprudent, caused the injury. As previously shown, an examination of the testimony reveals that Mrs. Hambleton was not placed in any fear of arrest, force, or violence and that she was willing to carry on the conversa-

tion with Mr. Anderson and, further, that Mr. Anderson was never asked to leave the premises.

The appellees seek to distinguish insanity from mental anguish, admitting that mental anguish is not subject to positive proof. The testimony of the neuropsychiatrist, Dr. Riley, clearly shows that a psychosis develops from mental anguish. Therefore, if mental anguish is not subject to positive proof, how then can the appellees contend that insanity is subject to positive proof?

The appellees state that no case has been cited by the appellant where the Supreme Court of the State of Washington has held that no recovery can be allowed when the plaintiff has suffered a real injury even though the cause thereof did not involve an invasion of the plaintiff's person or property. In this regard the appellees overlooked the case of *Barnes v. Bickle*, 111 Wash. 133. In that case the acts of the defendant retarded the plaintiff's recovery from an operation. There was before the Court a real physical injury, aside from the mental anguish, yet no recovery was allowed because of the lack of an invasion of the plaintiff's person or property.

The appellees next seek comfort in a quotation from the restatement of torts quoted on Pages 12 and 13 of the appellees' brief. The quotation from the

restatement, which states that recovery will be allowed for intentional or unreasonable emotional distress, is limited to cases in which the actor "should recognize" that his acts are likely to result in illness or other bodily harm. As Dr. Riley, witness for the appellees, stated in his testimony, only an expert trained in neuropsychiatry would be able to determine whether questioning of an individual would precipitate a psychosis (T.R. 71 and 72). It is, therefore, clear from the proof in this case that Mr. Anderson had no way of recognizing whether his acts would result in illness or other bodily harm to Mrs. Hambleton. The Restatement of the Law of Torts is not the law of Washington in any event.

The appellees next cite the case of *Emden v. Vitz*, 198 Pac. (2d), 696 (88 Cal. App. (2d) 313). The law as stated in the decision in that case is not the law of the State of Washington. It is the law of the State of California. The Federal Tort Claims Act, as originally enacted, Section 931, Title 28, U.S.C., and as revised, Section 1346, Title 28, U.S.C., renders the Government liable only in those cases where a private person would be liable in accordance with the law where the act or omission occurred. Therefore, the law of the State of California is of no avail to the appellees when the act occurred in the

State of Washington. It should be further pointed out that according to the facts in the Emden case, the defendant "leaned against the door so the plaintiff could not leave." This was false imprisonment and as such an assault which, of course, is an invasion of the plaintiff's person. The following is quoted from 6 C.J.S. 802:

"False imprisonment always includes a technical assault, and generally a battery; but if there is no touching of the prisoner it is not a battery."

Although in the decision in the Emden case, *supra*, the California Court allowed recovery. The decision states:

"In respect to the right to recover damages for personal injuries resulting from an emotional or mental disturbance, it has been said that 'the authorities are in a state of dissension probably unequalled in the law of torts'." * * *

and further on in the opinion it is stated:

"It may be conceded that the foregoing propositions, although firmly based upon well-recognized principles of tort law, have not met with universal application, for a definite cleavage of opinion exists among the authorities from the various jurisdictions as to whether an action for personal injuries resulting solely from fright or other mental distress may be maintained in the absence of some contemporaneous impact or injury to the plaintiff, however slight it might be." See cases collected in Hallen, *Damages for Physical Injuries Resulting From Fright or Shock*,

(1933) 19 Va. L. Rev. 253; 98 A.L.R. 402; 76 A.L.R. 682; 40 A.L.R. 983; 11 A.L.R. 1120.

As will be noted in 23 A.L.R. 361, the State of Washington is one of the leading states holding that no recovery for mental shock and pain will be allowed in the absence of some impact.

The appellees seek to use the case of *Gadbury v. Bleitz*, 133 Wash. 134, as authority for the trial Judge's holding that a tort was committed. The Gadbury case involved an undertaker threatening to hold the body of the plaintiff's son until an old bill was paid. Although the court allowed recovery for emotional and mental distress, such recovery was allowed, first, because the act of the defendant was a misdemeanor as defined by the statutes of the State of Washington and, second, because it was an invasion of the plaintiff's right to have her son given a proper burial. The following quotations are from the decision in the Gadbury case:

"In this connection it might be well to notice that the legislature has seen fit to make the detention of the dead body of a human being punishable as a misdemeanor. * * * * * it has been held in many cases that those persons who by relationship have a peculiar interest in seeing that the last sad rites are properly given the deceased may maintain the action. In *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 68

L.R.A. 956, this question is completely answered as follows:

“There is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element’.”

It should be further noted that the Supreme Court of the State of Washington has limited recovery for mental shock and pain to cases involving improper burials, as stated in the case of *Corcoran v. Postal Telegraph-Cable Company*, 80 Wash. 570.

“In *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. *This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved.* The acts were regarded by the court as willful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff’s rights.” (Italics ours.)

The appellees next cite *Clark v. Washington Retail Creditmen*, C.C.A. (D.C.) 105 Fed. (2d) 62. That

case arose in the District of Columbia and as such is not the law of the State of Washington. Judge Vinson wrote a dissenting opinion which is more in conformity with the law of the State of Washington.

The appellees next seek to represent to this Court that the conduct of Mr. Anderson was willful and wanton. In this regard, there is not one word of evidence which would indicate that Mr. Anderson knew or had any knowledge of Mrs. Hambleton prior to the interview, nor is there any evidence which would in any way indicate that he had any malice or ill feeling toward Mrs. Hambleton. Further, it should be pointed out here that although the complaint alleges intentional acts, the trial Judge did not find that the acts were intentional, nor that Mr. Anderson was willful and wanton. Further, it is difficult to understand how Mr. Anderson could intentionally or willfully precipitate psychosis when, as the neurosychiatrist testified, only an expert could tell what might, or might not, precipitate a psychosis.

The appellees next seek to rely upon an actual physical illness resulting directly from Mr. Anderson's conduct. As has been previously shown in this brief, Mrs. Hambleton was so emotionally upset upon visiting Dr. Flaherty on December 31, 1947 and January 19, 1948, that the doctor had to prescribe medi-

cine to calm her nerves. Mrs. Hambleton took this medicine during the course of the interview solely because the doctor had prescribed it and not because of anything Mr. Anderson had done.

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATION OF ERROR No. 3

Specification of Error No. 3 is directed to the lack of evidence upon which the trial Court could find that the proximate cause of psychosis were the acts of Mr. Anderson. Here again, the appellees seek to rely upon intentional acts. Again the Court is reminded that there is no finding of fact that Mr. Anderson's acts were intentional as regards causing any emotional distress to Mrs. Hambleton.

The appellees state in their brief on Page 18, "We are not concerned with his negligent or careless inadvertent acts." The appellees fail to take into account the trial Court's finding of fact wherein only negligence is mentioned. Despite the testimony of the appellees' own witness, Dr. Riley, that only an expert could tell what would precipitate a psychosis, the appellees seek to convince this Court that Mr. Anderson should have recognized that his acts were likely to precipitate a psychosis. It is the appellant's contention that this argument has no foundation.

If the appellees' theories were actually the law, then every Government investigator would first have to have a prospective witness examined by a neuropsychiatrist before asking any questions, otherwise, the investigator would subject the Government to possible liability in a suit such as this. The net result would then disqualify all emotionally unstable persons as witnesses.

The appellees lay much stress on the statements to the effect that Mr. Anderson persisted in the interrogation. In this regard it must be remembered that Mrs. Hambleton was perfectly willing to carry on the conversation and was in turn questioning Mr. Anderson on subjects about which she was seeking information.

The appellees state that there was no other factor which could have caused the psychosis. It must be remembered that insulin and electroshock treatments are for the purpose of making the patient forget the emotional disturbances which caused the psychosis (T.R. 69, 70, 97, 98). Admittedly, Mrs. Hambleton had been living with a drunkard for sixteen years and she had on many occasions considered divorce. For approximately three weeks at least, prior to Mr. Anderson's interview, she had been emotionally upset. (Dr. Flaherty's testimony).

It is the appellant's contention that the causal connection between Mr. Anderson's interview and the subsequent psychosis has not been established. On the contrary, the evidence shows clearly that Mrs. Hambleton did not, after her insulin and electroshock treatments, consider her husband's conduct as disturbing to her, which fact clearly shows that this was in fact the factor which caused her mental breakdown, and not Anderson's conduct.

On Page 80 of the transcript Dr. Riley states that Mr. Hambleton's drinking could have caused Mrs. Hambleton's mental collapse if it were a severe enough strain on Mrs. Hambleton. Mrs. Hambleton certainly furnished ample proof of the severity of the strain when she testified that Mr. Hambleton had been a drunkard for 16 years and that she could have sued him for divorce many times. (T.R. 62, 66).

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATION OF ERROR No. 4

Specification of Error No. 4 is directed to the trial Judge's failure to dismiss the appellees' action for the reason that the same falls within the exceptions to the Tort Claims Act.

The discretionary function which Anderson was exercising as criminal investigator for the Depart-

ment of the Army is one for which Anderson himself would not have been liable under either the laws of the State of Washington or those of the United States. The Congressional reports dealing with the historical background of the Tort Claims Act throw light on the intent of Congress in excepting discretionary functions from the operation of the Act. Senate Report No. 1400 of the 79th Congress, Second Session, states in part on page 33 as follows:

“Section 421. *Exceptions.*

This section specifies types of claim which would not be covered by the title. They include claims based upon the performance or nonperformance of discretionary functions or duties; claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation; and claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available.

* * * ”

The appellees in their brief have italicized a quotation in *Kendrick v. U. S.*, 82 Fed. Supp. 430, which purports to limit the exercise of discretionary functions to executive officers. Sub-paragraph A of Section 2680, Title 28 U.S., the paragraph exempting discretionary functions from the operation of the Act, uses the word *employee* of the Government. An

employee is not necessarily an executive and has been recognized as such by the Courts.

In *Cooper v. O'Connor*, 99 Fed. (2d) 135, an agent of the Federal Bureau of Investigation, who was charged with duties identical to those of Mr. Anderson, was held not to be liable for discretionary acts he performed in the course of his duty in making investigations for the Department of Justice. The Court in that case set out specifically that while there have been many contentions that the discretionary exception should apply only to executive officers and heads of the departments, that the contention was not well taken, Paragraph 17, Page 142:

“On the other hand, to hold that only the heads of departments should be immune from liability under the rule would defeat its purpose. We know that heads of the Federal Departments do not themselves engage in such activities as are here involved. Their administrative duties make such participation impossible. There must be, necessarily, delegation of authority for such purposes. When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself. *De Arnaud v. Ainsworth*, supra, at pages 177, 181; *United States to Use of Parravicino v. Brunswick*, supra,. To hold otherwise would disrupt the government’s work in every department. ‘Its head can intelligently act only through subordinates.’ *Farr v. Valen-*

tine, 38 App. D.C. 413, 420, Ann, Cas. 1913C, 821. The fact that our country has grown so great as to require a multiplication of governmental officials in some small measure proportionate thereto, cannot obscure the fact that the duties performed are the same as those once performed by heads of departments, and that fearless performance of official duty is as essential today as it was yesterday.

Therefore, we conclude that as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial, and appellant's contention must fail."

The *Cooper v. O'Connor* case, above cited, restates the immunity of individuals in Government employ for civil liability for acts performed in the scope of their duties. It is stipulated in this case that Anderson was acting within the scope of his authority when he called at the Hambleton home to make his investigation. Under the Tort Claims Act the United States stands in the position of Anderson as far as liability for his acts is concerned. As a corollary to this, the United States has all the defenses of Anderson to this action. The United States could not be held to a higher degree of liability than Anderson could be. Anderson was an investigator for the Department of the Army. The United States can therefore avail itself of any defense Anderson might have in such a capacity.

Cooper v. O'Connor, cited above, and all of the cases which have followed, are authority for the fact that an investigator for the Government is not liable for acts done within the scope of his authority. In *Cooper v. O'Connor* the judge dismissed an action against Government employees as private individuals on the grounds stated above. Certiorari denied 305 U.S. 643; Rehearing denied 305 U.S. 673; Rehearing again denied 307 U.S. 651.

The Court takes particular notice in *Cooper v. O'Connor* that officers who investigate crimes and detect criminals are closely related to the judiciary which has always been excepted from civil liability for its official acts. The court again states on Page 140 as follows:

“The administration of criminal justice would be impossible without the active participation of public officials representing the departments concerned with the enforcement of particular laws.”

The Court goes on further to use *Spalding v. Vilas*, 161 U.S. 483, cited in appellant's original brief, for authority that even the presence of malice in the mind of the Government employee in carrying out his duty does not make him personally liable, and states as follows:

“* * * It is now generally recognized that, as applied to some officers at least, even the absence

of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority. * * *

"Hence the officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity but because such immunity tends to insure zealous and fearless administration of the law."

The law of Washington on this subject as cited in appellant's original brief on Page 36 clearly shows that Anderson would not have been liable for the acts complained of in the State Court. See also *Anderson v. Manley*, 181 Wash. 327, 43 Pac. (2d) 39. Thus the "tort" here claimed would not be recognized as ground for liability under the Washington law or under the Federal cases.

It is difficult to see how the appellees find any comfort in their quotations from the Court's oral decision which is set out on Pages 22 and 23 of appellees' brief, to the effect that Anderson be held to the same degree of skill which a surgeon is assumed to possess. Clearly, Anderson had no knowledge of neuropsychiatry, and as such could not possibly have been possessed with the discretion of a neuropsychiatrist.

Further, in the same quotation from the Court's oral opinion there is a statement to the effect that Anderson's interrogation on delicate personal subjects was not related to the investigation which he

was conducting. If appellees seek to rely upon this finding of the trial Court the Government is clearly not liable. If Anderson was interrogating Mrs. Hambleton on matters outside of his official investigation then clearly he was not acting within the scope of his authority. Also, if it is contended by the appellees that Anderson was using some sort of implied threat or duress to force Mrs. Hambleton to give information, such conduct on the part of Anderson would clearly be in violation of the appellees' Constitutional rights. The Government has no authority to authorize an agent to violate appellees' Constitutional rights, therefore, if the appellees seek to follow such a theory they have argued themselves out of the jurisdiction of this court. As clearly stated in *Bell v. Hood*, 71 Fed. Supp. 813, on page 817:

“But the Federal Government as sovereign has never consented to be sued for damages resulting from invasion of the rights protected by the Fourth and Fifth Amendments. To the contrary, since the commencement of this action, congress has expressly denied consent to sue the Federal Government upon ‘any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process * * *’ even in cases where such torts are committed by a federal officer ‘while acting within the scope of his office or employment * * *.’ Federal Tort Claims Act, 28 U.S.C.A. Sec. 921, 931, 943. * * * Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents

the Government and hence loses the protection of sovereign immunity from suit."

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 5

Specification of Error No. 5 is directed to the trial judge's erroneous ruling that the wife of the private detective cannot be compelled to reveal the name of one of her husband's former clients.

The appellees argued in their brief that the appellant was seeking to indulge in hearsay testimony. A review of the record on Pages 52 and 53 clearly shows that all the appellant asked of the witness, Mrs. Hambleton, was, "Do you recall who that call was from?" In response to this question the witness volunteered that the lady who called was a former client of her husband, and that she had advised Mrs. Hambleton that she had told Anderson of Mrs. Hambleton's operation. The appellant again asked, "What is the lady's name?" The witness, Mrs. Hambleton, refused to answer, claiming privilege. It is clear that the appellant was not seeking to indulge in hearsay testimony from the questions asked. All the appellant sought to obtain from the witness was the name of the party who called.

It must be remembered that this was cross examination. On direct examination the appellees had

gone over everything that was supposed to have happened during the interview. If a telephone call was received by Mrs. Hambleton during the course of the interview it was proper for the appellant to determine on cross examination who the party was that called. Mrs. Hambleton seeking to bolster her case, as well as to supply some evidence to substantiate the allegation in the complaint to the effect that Anderson had been warned not to upset her volunteered the hearsay testimony. Obviously, appellant would have no knowledge of what the hostile witness would volunteer in answer to a question which called for a direct answer. The witness having volunteered such hearsay testimony little could be accomplished by way of asking that the Court strike the testimony. The testimony was very damaging to the appellant's case, and the appellant is entitled to the right to re-but that testimony. However, when the Court refused to compel the witness to state the name of the party calling it was impossible to offer rebuttal evidence. Likewise, in the absence of testimony from Mrs. Hambleton as to the name of the party who called, the testimony which the Government was prepared to present which would prove that portion of Anderson's report rendered to his superiors in January, 1948, as set out in paragraph 21 on Page 113 of the record, could not be presented.

Therefore, the Court's ruling that Mrs. Hambleton could not be compelled to reveal the name of one of her husband's former client's is reversible error. The subject matter was not a collateral point, but involved a very important and material matter. The cases cited in appellant's original brief clearly show that the Court's ruling was entirely in error. The appellant's right of cross-examination was virtually denied.

The appellant requests of this Court that a ruling be made on Specification of Error No. 5. The purpose for such request is that a similar question will undoubtedly be raised in some criminal case in which the Government would have no right of appeal. In the absence of a specific ruling by this Court on this question it is highly probable the trial Judge would follow the ruling of the trial Judge in this case. It is, therefore, of considerable importance to the Government that the question be settled in the Ninth Circuit as to whether the name of a private detective's client falls within some privilege rule.

CONCLUSION

The appellant having fully replied to the appellees' brief, and having shown to this Court that the trial Judge committed reversible errors in each of the five specifications set out in the appellant's original brief, it is respectfully requested that this Court enter an order reversing the lower Court and directing that an order be entered dismissing the appellees' action with prejudice.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

APPENDIX I

No. 1984

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For cause of action against the defendant, plaintiffs complain and allege as follows:

I

Plaintiffs are and at all times mentioned herein have been husband and wife, constituting a marital community under the laws of the State of Washington, residing in Seattle, Washington, in the territorial jurisdiction of the above-entitled court, to-wit, the Northern Division of the Western District of Washington. The acts herein complained of all occurred within said Division and District. Jurisdic-

tion of this action is conferred upon the above entitled court by U.S.C.A., Title 28, Section 931.

II

At all times mentioned herein William Anderson was a sergeant in the United States Army, acting as a CID agent, and under the jurisdiction of the Provost Marshal, Fort Lewis, Washington. All acts done, as alleged herein, by said William Anderson, were done on behalf of defendant United States of America, while acting within the scope of his office or employment and in the line of duty.

III

On or about January 20, 1948, said William Anderson called at the home of plaintiffs at 8312 35th Avenue S. W., Seattle, Washington, while plaintiff O. E. Hambleton was absent therefrom, contacted plaintiff Harriet Elizabeth Hambleton, in the course of and in order to further an investigation he was conducting, and did the following acts and made the following statements, unreasonably and intentionally subjecting her to the severe emotional distress which she suffered. Said William Anderson grilled plaintiff Harriet Elizabeth Hambleton for a period of about three and one-half hours on matters concerning which she had no knowledge and with which she had no

connection. He stated to plaintiff Harriet Elizabeth Hambleton, among other things, that her husband O. E. Hambleton had left her and was consorting with a redheaded woman, that her said husband was under arrest, being held on charges of grand larceny and drunken driving, and talked to her about her getting a divorce from her husband.

IV

None of the statements made by said William Anderson, as above alleged, were true. The statements made were of such a nature and the continuous grilling carried on was of such a nature, that William Anderson knew or should have known that the resulting emotional and mental distress was likely to result in illness and bodily harm to plaintiff Harriet Elizabeth Hambleton. This is particularly true in view of the fact that plaintiff Harriet Elizabeth Hambleton was at the time convalescing from a major operation and her resistance to any emotional stress was low, and William Anderson was informed of that fact and warned not to upset her.

V

As a direct and proximate result of the actions of said William Anderson as alleged herein, and of the

severe emotional distress to which he subjected her, plaintiff Harriet Elizabeth Hambleton suffered injury as follows: She suffered a complete mental collapse so that she was insane for a period of over a month; during which period she was hospitalized and under a doctor's care and underwent severe treatment, including shock treatments, for her mental disorder. The injury caused is continuing and permanent since it left said plaintiff in a condition where the said mental disorder, although now alleviated, is likely to recur. The injury and necessary treatment caused to plaintiff Harriet Elizabeth Hambleton, and is likely to further cause in the future, severe anguish, pain and suffering. Said injuries were all to her damage in the sum of Ten Thousand Dollars (\$10,000.00).

VI

As a direct and proximate result of the actions of said William Anderson as alleged herein, plaintiffs have incurred a doctor bill in the amount of \$270.00, hospital bills in the amount of \$280.52 for plaintiff Harriet Elizabeth Hambleton, and have been damaged in those amounts.

WHEREFORE, plaintiffs pray judgment against the defendant in the amount of \$10,550.52,

for costs of suit, and for a reasonable amount as attorneys fees.

STANLEY C. SODERLAND
Attorney for Plaintiffs

STATE OF WASHINGTON,
COUNTY OF KING

O. E. HAMBLETON, being first duly sworn, on oath deposes and says: that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

O. E. HAMBLETON

SUBSCRIBED AND SWORN TO before me
this 30th day of April, 1948.

STANLEY C. SODERLAND,
Notary Public in and for the State
of Washington, residing at Seattle.

No. 12514

United States
Court of Appeals
For the Ninth Circuit.

ORESTUS CAVNESS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 330)

Appeal from the United States District Court
District of Hawaii.

FILED

JUL 10 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

UNITED STATES DISTRICT ATTORNEY, by
HOWARD K. HODDICK, ESQ.,

Assistant U.S. District Attorney,

Federal Building,
Honolulu, T. H.

For the Plaintiff,

United States of America.

FONG, MIHO & CHOY, by
KATSURO MIHO, ESQ.,

Suite 202, Alakea Building,
Alakea and King Streets,
Honolulu 13, T. H.,

For the Defendant, Orestus Cavness.

In the United States District Court
for the District of Hawaii

Cr. No. 10,256
(26 U.S.C. Section 2553(a))

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ORESTUS CAVNESS,
Defendant.

WARRANT FOR ARREST

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant named therein, bail being fixed at \$.

/s/ D. E. METZGER,
Judge, United States District Court for the District
of Hawaii.

[Title of District Court and Cause.]

INDICTMENT

The Grand Jury Charges:

That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of coca leaves, to wit, 8 capsules, each containing cocaine

which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Dated: Honolulu, T. H., this 15th day of September, 1949.

A True Bill,

/s/ HERMAN L. NICKELS,
Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,
United States Attorney.

[Endorsed]: Filed September 15, 1949.

AFFIDAVIT FOR SEARCH WARRANT

(Internal Revenue Form)

United States of America,
District of Hawaii—ss.

On this 12th day of July, A.D. 1949, before me, Harry Steiner, a United States Commissioner in and for the District of Hawaii, personally appeared Gerry Wilson, who being duly sworn, deposes and says:

That she has good reason to believe and does believe that in and upon certain premises within the District of Hawaii, to wit, the premises known as:

and particularly described as follows:

in a one story wooden-frame building located at 3811 Leahi Avenue, Honolulu, T. H., said wooden-frame building is painted white with red trimming. The entrance of said building is on Leahi Avenue.

there have been and are now located and concealed and sold certain property used as the means of committing a fraud upon the revenue of the United States, to wit:

Cocaine in violation of Internal Revenue Code, Sections 2553(a) and 2593(a).

That the facts tending to establish the grounds of this application and the probable cause of affiants believing that such facts exist, are as follows:

That the Affiant, Gerry Wilson, on July 10, 1949, visited the above-described premises and purchased one (1) capsule of Cocaine from a negro man known to her as Orestus Cavness, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Cocaine from Orestus Cavness on numerous occasions from June to July, 1949, inclusive, in said premises. From the Affiant's observation, she finds that these premises are a place where Cocaine is kept for sale and replenished when needed. Affiant further states that while in the premises on numerous occasions she had seen Orestus Cavness after he had received the money he would go into another part of the house and return in a few minutes and would deliver the Cocaine to the customers.

Wherefore, your affiant prays that a Search War-

rant may issue authorizing a search of the aforesaid premises in the manner provided by law.

/s/ GERRY WILSON.

Sworn to and subscribed before me, this 12th day of July, 1949.

[Seal] /s/ H. STEINER,
United States Commissioner,
District of Hawaii.

District Court of the United States
District of Hawaii Division

Commissioner's Docket No. 3
Case No. 127

UNITED STATES OF AMERICA

vs.

ORESTUS CAVNESS,

SEARCH WARRANT

To William K. Wells, Acting District Supervisor,
Bureau of Narcotics:

Affidavit having been made before me by Gerry Wilson that she is positive that on the premises known as in a one story wooden-frame building located at 3811 Leahi Avenue, Honolulu, T. H., said wooden-frame building is painted white with red trimming. The entrance of said building is on Leahi

Avenue. In Honolulu, District of Hawaii, there is now being concealed and sold certain property, namely Cocaine, in violation of Internal Revenue Code, Sections 2553(a) and 2593(a) which are that the Affiant, Gerry Wilson, on July 10, 1949, visited the above-described premises and purchased one (1) capsule of Cocaine from a negro man known to her as Orestus Cavness, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Cocaine from Orestus Cavness on numerous occasions from June to July, 1949, inclusive, in said premises. From the Affiant's observation, she finds that these premises are a place where Cocaine is kept for sale and replenished when needed. Affiant further states that while in the premises on numerous occasions she had seen Orestus Cavness after he had received the money he would go into another part of the house and return in a few minutes and would deliver the Cocaine to the customers and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds/ for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return

this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 12th day of July, 1949.

/s/ HARRY STEINER,
U.S. Commissioner.

RETURN

I received the attached search warrant July 12, 1949, and have executed it as follows:

On July 19, 1949, at 5:40 o'clock p.m., I searched (the person) (the premises) described in the warrant and

I left a copy of the warrant with Orestus Cavness together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

2 capsules suspected to be cocaine adhesive to the top of a Vicks Inhaler. 1 shattered base of Vicks Inhaler matching above part. 6 capsules suspected to be cocaine. 4 pieces of shattered Vicks Inhaler tube. 1 empty Vicks Inhaler tube. 1 box containing 31 empty gelatin capsules No. 5.

This inventory was made in the presence of Orestus Cavness and Capt. Hugh L. Whitford.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ WILLIAM K. WELLS.

Subscribed and sworn to and returned before me
this 20th day of July, 1949.

[Seal] /s/ H. STEINER,
United States Commissioner.

[Title of District Court and Cause.]

MOTION FOR THE SUPPRESSION
OF EVIDENCE

Orestus Cavness hereby moves this Court to direct that certain property, to wit: A 1948 blue Hudson Sedan License Plate Number H-9530, as well as two (2) capsules adhesive to the top of a Vicks Inhaler, one shattered base of Vicks Inhaler, six (6) capsules, four (4) pieces of shattered Vicks Inhaler tube and one (1) empty Vicks Inhaler tube which, on the 19th day of July, 1949, at or about 5:40 p.m., on or near the premises known as 3811 Leahi Avenue, in the City and County of Honolulu, District of Hawaii, was unlawfully seized and by certain deputies of the United States Marshal of this District whose true names and number are unknown to the Defendant, be suppressed as evidence against him in any criminal proceeding.

The Defendant further states that the property was seized against his will and without a search warrant.

Dated at Honolulu, T. H., this 5th day of December, A.D. 1949.

ORESTUS CAVNESS,
Defendant,
By FONG, MIHO & CHOY,
His Attys.,
By /s/ K. MIHO.

Amended 12-7-49

Additional Grounds

Incorrectness of dates charged in
the search warrant.

[Title of District Court and Cause.]

AFFIDAVIT OF ORESTUS CAVNESS

Territory of Hawaii,

City and County of Honolulu—ss.

Orestus Cavness, being first duly sworn, on oath,
deposes and says:

That he is the owner of a blue 1948 Hudson sedan
bearing Territory of Hawaii License Plate Number
H-9530;

That on or about July 19, 1949, at about 5:40 p.m.,
Affiant drove his aforementioned Hudson into or
near the driveway at 3811 Leahi Avenue, Honolulu,
Territory of Hawaii, and parked there;

That a certain Deputy of the United States Mar-
shal for the District of Hawaii and his assistants,
whose true names are unknown to Affiant, ap-
proached Affiant just as Affiant was getting out of
said Hudson;

Subscribed and sworn to and returned before me
this 20th day of July, 1949.

[Seal] /s/ H. STEINER,
United States Commissioner.

[Title of District Court and Cause.]

MOTION FOR THE SUPPRESSION
OF EVIDENCE

Orestus Cavness hereby moves this Court to direct that certain property, to wit: A 1948 blue Hudson Sedan License Plate Number H-9530, as well as two (2) capsules adhesive to the top of a Vicks Inhaler, one shattered base of Vicks Inhaler, six (6) capsules, four (4) pieces of shattered Vicks Inhaler tube and one (1) empty Vicks Inhaler tube which, on the 19th day of July, 1949, at or about 5:40 p.m., on or near the premises known as 3811 Leahi Avenue, in the City and County of Honolulu, District of Hawaii, was unlawfully seized and by certain deputies of the United States Marshal of this District whose true names and number are unknown to the Defendant, be suppressed as evidence against him in any criminal proceeding.

The Defendant further states that the property was seized against his will and without a search warrant.

Dated at Honolulu, T. H., this 5th day of December, A.D. 1949.

ORESTUS CAVNESS,
Defendant,
By FONG, MIHO & CHOY,
His Attys.,
By /s/ K. MIHO.

Amended 12-7-49

Additional Grounds

Incorrectness of dates charged in
the search warrant.

[Title of District Court and Cause.]

AFFIDAVIT OF ORESTUS CAVNESS

Territory of Hawaii,
City and County of Honolulu—ss.

Orestus Cavness, being first duly sworn, on oath,
deposes and says:

That he is the owner of a blue 1948 Hudson sedan
bearing Territory of Hawaii License Plate Number
H-9530;

That on or about July 19, 1949, at about 5:40 p.m.,
Affiant drove his aforementioned Hudson into or
near the driveway at 3811 Leahi Avenue, Honolulu,
Territory of Hawaii, and parked there;

That a certain Deputy of the United States Mar-
shal for the District of Hawaii and his assistants,
whose true names are unknown to Affiant, ap-
proached Affiant just as Affiant was getting out of
said Hudson;

That said Deputy of the United States Marshal and his assistant, whose true names and number are unknown to Affiant, then and there did forceably seize and subdue Affiant;

That Affiant, pursuant to a paper handed to him after being subdued, opened the door of the one-story wooden-frame building located at 3811 Leahi Avenue, Honolulu, aforesaid, for the Deputy of the United States Marshal;

That after searching the premises mentioned in said paper, the Deputy of the United States Marshal and his assistants took Affiant to a hospital for first aid;

That the aforementioned United States Marshal did search and then impound the aforementioned Hudson;

That said Hudson was seized against Affiant's will, without probable cause and without warrant;

That Affiant is informed and believes that two (2) capsules adhesive to the top of the Vicks Inhaler, one shattered base of Vicks Inhaler, six (6) capsules, four (4) pieces of shattered Vicks Inhaler tube and one empty Vicks Inhaler tube were seized without probable cause and without warrant and without Affiant's permission;

That the said Hudson seized is not that property described in the paper aforementioned; that the aforementioned paper is a search warrant for only the building located at 3811 Leahi Avenue, Honolulu, aforesaid, and not the entire grounds thereof;

That said search warrant was insufficient on its

face to authorize a search and seizure of Affiant's person, Affiant's Hudson and Affiant's grounds;

That Affiant makes this affidavit in order that the aforementioned property be suppressed as evidence against him in any criminal proceeding; and

Further Affiant sayeth naught.

/s/ ORESTUS CAVNESS.

Subscribed and sworn to before me this 5th day of December, 1949.

[Seal] /s/ TAMIE M. HIRAI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires March 19, 1953.

NOTICE OF MOTION

To: United States of America and U. S. District
Attorney,

You and each of you will please take notice that the foregoing Motion will be presented to the Honorable, Judge of the above-entitled Court in his Courtroom in the, Honolulu, T. H., on, the day of, 1949, at o'clock . . m.

ORESTUS CAVNESS,

Defendant,

By FONG, MIHO & CHOY,

His Attys.

By /s/ K. MIHO.

[Endorsed]: Filed December 5, 1949.

The United States District Court
For the District of Hawaii

From the Minutes of Monday, December 5, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for trial.

Motion for the suppression of evidence was presented to the Court and was ordered to be placed on file.

The following jurors were duly empaneled and sworn to try the issues herein:

Earl J. Anderson	Leo F. Andre
Charles H. Dole	Ted Benedict
Herbert A. Clark	Samuel A. Parish
William H. Bomke	Clyde J. Hatchell
Ralph H. Moyers	Richard S. Yoshioka
Andrew K. Koseki	Herbert V. Turner

At 12:05 p.m., the Court ordered that this case be continued to 1:15 p.m., this day for further trial.

At 1:20 p.m., opening statement was made by Mr. Hoddick.

All witnesses were placed under rule of court and excluded from the courtroom.

At 1:25 p.m., Mr. William K. Wells, Agent-in-Charge, Bureau of Narcotics, was called and sworn and testified on behalf of the United States.

One envelope containing eight capsules of cocaine was marked for identification as United States "A."

One envelope containing pieces of a broken Vick's Inhaler Tube was marked for identification as United States "B."

One envelope containing four pieces of a Vick's Inhaler Tube was marked for identification as United States "C."

One envelope containing pieces of a broken Vick's Inhaler Tube was marked for identification as United States "D."

One envelope containing a Vick's Inhaler Tube was marked for identification as United States "E."

One box containing empty capsules was marked for identification as United States "F."

At 4:02 p.m., the Court ordered that this case be continued to December 7, 1949, at 2 p.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Wednesday, December 7, 1949
[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also

came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 2 p.m., Mr. Wells resumed the witness stand and testified further.

Oral motion to amend the motion for the suppression of evidence was granted by the Court.

At 3:43 p.m., Mr. Paul Shaffer, Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 4 p.m., the Court ordered that this case be continued to December 8, 1949, at 9 a.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Thursday, December 8, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm of Fong, Miho & Choy, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the

jury heretofore empaneled and sworn to try the issues herein was present.

At 9:03 a.m., Mr. Shaffer resumed the witness stand and testified further.

United States "C" for identification was offered in evidence by the government.

At 10:55 a.m., the jury was excused and argument was had on the offer in evidence.

At 11 a.m., the jury was summoned and then excused until 2 p.m. this day.

At 11:15 a.m., oral motion to further amend the motion for the suppression of evidence was granted by the Court.

Argument was then had by Mr. Ahrens and Mr. Miho on said motion to suppress.

Mr. Orestus Cavness, defendant herein, was called and sworn and testified on his own behalf on motion to suppress.

At 12:22 p.m., the Court ordered that this case be continued to 1:30 p.m., this day for further trial and the clerk was instructed to notify the jury to appear on December 9, 1949, at 9 a.m.

At 1:40 p.m., the defendant Cavness resumed the witness stand and testified further.

At 2:25 p.m., Mr. Roger C. Marcotte, Officer, Honolulu Police Department, was called and sworn and was temporarily withdrawn.

At 2:40 p.m., Mr. Arthur F. Abbey, Reserve Police Officer, Honolulu Police Department, and Deputy High Sheriff, Territory of Hawaii, was called and sworn and testified on behalf of the United States on motion to suppress.

At 3:30 p.m., the witness Marcotte was recalled and testified on behalf of the United States on motion to suppress.

At 3:45 p.m., Mr. Alfred A. Souza, Sergeant, Honolulu Police Department, was called and sworn and testified on behalf of the United States on motion to suppress.

At 4:26 p.m., the Court ordered that this case be continued to December 9, 1949, at 9 a.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Friday, December 9, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for further trial.

At 9:05 a.m., Mr. Hugh Whitford, Lieutenant, Honolulu Police Department, was called and sworn and testified on behalf of the United States on motion to suppress.

At 9:43 a.m., argument was had by Mr. Ahrens.

At 10:18 a.m., the jury was summoned and then excused until December 12, 1949, at 9 a.m.

At 10:35 a.m., argument was had by Mr. Hoddick.

At 11:35 a.m., argument was had by Mr. Miho and Mr. Ahrens.

At 12:08 p.m., upon the evidence adduced, the Court denied the motion for the suppression of evidence and ordered that this case be continued to December 12, 1949, at 9 a.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Monday, December 12, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:05 a.m., the witness Shaffer resumed the witness stand and testified further.

United States "C" for identification was admitted in evidence as United States Exhibit No. 1, marked and ordered filed.

At 9:30 a.m., Mr. Arthur F. Abbey, Reserve Police Officer, Honolulu Police Department, and Deputy High Sheriff, Territory of Hawaii, was called and sworn and testified on behalf of the United States.

One small envelope containing a tube top and empty parts of capsules was marked for identification as United States "A-1."

One small envelope containing two empty and four full capsules was marked for identification as United States "A-2."

At 10:55 a.m., Mr. Gilbert J. Carr, United States Customs Chemist, was called and sworn and testified on behalf of the United States.

United States "A-2" for identification was admitted in evidence as United States Exhibit No. 2-A, marked and ordered filed.

United States "A-1" for identification was admitted in evidence as United States Exhibit No. 2-B, marked and ordered filed.

United States Customs Laboratory Card No. 200-201 was admitted in evidence as United States Exhibit No. 2-C, marked and ordered filed.

At 11:51 a.m., Mr. Hugh Whitford, Lieutenant, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 12 noon, the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2 p.m., the witness Whitford resumed the witness stand and testified further.

At 3:18 p.m., Mr. Alfred A. Souza, Sergeant, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 4:03 p.m., Mr. Miho requested that the Court and Jury view the premises at 3811 Leahi Avenue, Honolulu, T. H.

At 4:05 p.m., the Court ordered that this case be continued to December 13, 1949, at 9 a.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Tuesday, December 13, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:30 a.m., the jury was excused and argument was had by Mr. Miho on motion for a mistrial.

At 9:37 a.m., argument was had by Mr. Hoddick.

At 9:50 a.m., closing argument was had by Mr. Miho.

At 9:51 a.m., motion for a mistrial was denied by the Court.

At 9:55 a.m., the jury was summoned and the witness Sousa resumed the witness stand and testified further.

At 10:15 a.m., Mr. Harry L. Pestano, Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 10:26 a.m., the jury was excused and a discussion was had by the Court and respective counsel on the Court's ruling on motion to suppress.

At 10:50 a.m., the jury was summoned.

At 11:07 a.m., the government rested its case.

Motion for judgment of acquittal was made by Mr. Ahrens.

At 11:10 a.m., the jury was excused until 2 p.m. this day, and at 11:15 a.m., argument was had by Mr. Ahrens on said motion.

At 11:40 a.m., argument was had by Mr. Hoddick.

At 12 noon, the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2:05 p.m., the Court and jury proceeded to view the premises at 3811 Leahi Avenue, Honolulu, T. H., returning at 3:07 p.m.

Motion for judgment of acquittal was denied by the Court.

At 3:10 p.m., Mr. Orestus Cavness, defendant herein, was called and sworn and testified on his own behalf.

At 3:35 p.m., the jury was excused and argument was had by Mr. Hoddick on the objections of Mr. Miho to a question directed to the witness.

At 3:40 p.m., the jury was summoned and examination of the witness continued.

At 3:50 p.m., the Court ordered that this case be continued to December 14, 1949, at 9 a.m. for further trial.

The United States District Court
For the District of Hawaii

From the Minutes of Wednesday, December 14, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:04 a.m., the defendant resumed the witness stand and testified further.

At 9:30 a.m., Dr. Thomas Min, City & County Health Department, was called and sworn and testified on behalf of the defendant.

At 9:40 a.m., the defendant rested his case.

At 9:42 a.m., Mr. Roger C. Marcotte, Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 9:50 a.m., both sides rested.

Motion for judgment of acquittal was made by Mr. Ahrens.

The jury was excused until 2 p.m. this day and at 10:10 a.m. argument was had by Mr. Ahrens on said motion.

At 10:47 a.m., argument was had by Mr. Hoddick.

At 11 a.m., closing argument was had by Mr. Miho.

At 11:10 a.m., the motion was denied by the Court and the matter of settling instructions was taken up in chambers.

At 2:25 p.m., opening argument was had by Mr. Hoddick.

At 2:35 p.m., argument was had by Mr. Miho, followed at 3:35 p.m., with argument by Mr. Hoddick.

At 3:51 p.m., the Court instructed the jury.

At 4:25 p.m., the jury having been excused, the defendant objected to the Court's refusal to give Defendant's Requested Instructions Nos. 1, 12, 13, 16, and 15 as amended, and to the giving of United States Instructions Nos. 5, 6 as amended, and 8. Objections were overruled by the Court.

At 4:30 p.m., the jury was summoned and Mr. Otto F. Heine and Mr. E. U. Moses, United States Marshal and Deputy United States Marshal, respectively, were sworn as bailiffs to take charge of the jury during its deliberations.

At 6:10 p.m., the jury, in the presence of respective counsel and the defendant, and through its foreman returned the following verdict of guilty which was ordered to be placed on file:

Cr. No. 10,256

(26 U.S.C. Section 2553(a))

“UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORESTUS CAVNESS,

Defendant.

“VERDICT

“We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Orestus Cavness, guilty as charged in the indictment herein.

“Dated: Honolulu, T. H., this 14th day of December, 1949.

/s/ LEO F. ANDRE,
Foreman.”

Upon request of Mr. Ahrens, the jury was polled by the Court as to the verdict returned, the verdict being confirmed by each juror.

Mr. Ahrens excepted to the verdict.

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered that this case be continued to December 28, 1949, at 10 a.m. for sentence and pre-sentence investigation.

[Title of District Court and Cause.]

RENEWAL OF MOTION OF JUDGMENT
OF ACQUITTAL

Comes now Orestus Cavness, Defendant in the above-entitled cause, in the above-entitled Court, by his attorneys Fong, Miho & Choy, and respectfully renews his Motion for Judgment of Acquittal on the ground that the verdict rendered in said cause on December 14, 1949, is contrary to the law and the weight of the evidence in that the evidence is insufficient to sustain a conviction because the United States failed to prove that the capsules and parts thereof, which contained cocaine were not in the original stamped package, did not have tax stamps on them, and did not come from the original stamped package.

The Court erred in holding that part of Section 2553(a) of Title 26 of U.S.C.A., as amended by Act July 1, 1944, pertaining to the presumption concerning possession constitutional. The United States also failed to prove that the Defendant on July 19, 1949, knowingly had possession and purchased eight (8) capsules containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package as charged in the indictment.

Dated at Honolulu, T. H., this 19th day of December, A.D. 1949.

ORESTUS CAVNESS,
Defendant.

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ JOHN E. AHRENS.

[Title of District Court and Cause.]

ALTERNATIVE MOTION
FOR A NEW TRIAL

Comes now Orestus Cavness, Defendant in the above-entitled cause, by his attorneys, Fong, Miho & Choy, and respectfully moves the above-entitled Court for a new trial upon the grounds that the verdict rendered in said cause on December 14, 1949, is contrary to the law and contrary to the evidence on the following grounds. The jury committed error because there was no proof beyond a reasonable doubt that the Defendant committed the offense alleged in the indictment. The above-entitled Court committed error in the following respects among others:

1. The Court erred in denying the Motion for Suppression of evidence because the search warrant issued in the instant case was a search warrant for the house only and not the rest of the premises because the premises were particularly described as being only "in a one-story wooden frame building . . .";

2. The Court erred in holding that the Defendant was legally arrested at the time he allegedly "shoved" Agent Wells;

3. The Court erred in holding that a search of the yard after the Defendant had been taken into the house was legal as an incident to the arrest that took place in the yard;

4. The Court erred in holding the search warrant valid because it was shown by the testimony of Mr. Wells who drew up the affidavit on which the search warrant was based that the affiant did not actually make the purchase referred to in the affidavit on the date alleged;

5. The Court erred in holding that the direction of the United States Commissioner to Mr. Wells in the warrant "you are hereby commanded to serve forthwith the place named for the properties specified," meant the warrant could be executed any time within the ten-day period rather than immediately;

6. The Court erred in denying the defense motion for a mistrial because of the statement of Sergeant Souza made in the presence of the jury to the effect that the Defendant appeared "hopped up." Although objected to, which objection was sustained by the Court who then instructed the jury to disregard said remark, nevertheless, such a statement so impressed the jury that it was not humanly possible to follow the Court's instruction and the jury was influenced by said remark thereby becoming prejudiced against the Defendant making a fair trial impossible;

7. The Court erred in denying the defense motion for a judgment of acquittal at the close of the Government's case because there was insufficient evidence to sustain a conviction, the reasons of which have been more fully set forth in a renewal of motion for judgment of acquittal;

8. The Court erred in holding constitutional that section of 2553(a) of Title 26 of U.S.C.A. dealing with the presumption concerning possession because as amended by Act, July 1, 1949, the presumption is reduced to an absurdity by the change of the word "for" to "from" since it is common knowledge that drugs themselves never have stamps directly attached to them;

9. The Court erred in allowing in evidence the various exhibits because the United States failed to lay a proper foundation for their introduction and because the chain of continuity from the time the exhibits were obtained by the various witnesses until the time they were introduced in the Court was defective;

10. That the Court erred in allowing in evidence that portion of Exhibit 2-A, to wit: four (4) capsules, because those capsules had not been identified as cocaine;

11. The Court erred in allowing in the evidence Exhibit 1-A because the quantity of cocaine present in the damaged capsules was not ascertained;

12. That Mr. Herbert A. Clark, one of the jurors, after instructed to retire to consider the

verdict did leave the confines of the jury room without the permission of the Court and attempted to make one or more phone calls and was, in fact, seen talking on the telephone which constituted a serious violation of his duties as a juror and said action was very harmful to the Defendant and the Defendant was thereby denied a fair trial;

13. That Mr. Samuel A. Parish, who was one of the jurors, is and was at the time of the trial a Reserve Police Officer and that Mr. Parish being in the Courtroom when a question was put to the jury as a whole as to whether or not any member of the jury was or ever had been a member of the Reserve Officer's Police force, Mr. Parish did fail to respond that he had been a member; and that if Mr. Parish were not actually present in the jury box when this question was asked, he upon being called and entering the jury box, knowing that the question was asked to the jury panel as a whole, should have volunteered this information and his failure to do so violated the Defendant's rights seriously and prejudiced the Defendant and made a fair trial impossible;

14. The Court erred in allowing testimony to be introduced over the various objections of the Defendant;

15. The Court erred in refusing to give Defendant's instruction Nos. 1, 12, 13, and 16 as instructed and erred in giving Defendant's instruction No. 15, as amended over objection;

16. The Court erred in giving United States Instruction Nos. 5, 6, as amended, and No. 8 and more particularly United States Instruction No. 6 because it was incomplete and not a true statement of the law.

Dated at Honolulu, T. H., this 19th day of December, A.D. 1949.

ORESTUS CAVNESS,
Defendant.

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ JOHN E. AHRENS.

[Endorsed]: Filed December 19, 1949.

The United States District Court for the
District of Hawaii

From the Minutes of Thursday,
December 29, 1949

[Title of Cause.]

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for hearing on renewal of motion of judgment of acquittal and alternative motion for a new trial.

At 10:05 a.m., argument was had by Mr. Ahrens.

At 11:08 a.m., Mr. Otto F. Heine, United States

Marshal, was called and sworn and was temporarily withdrawn from the witness stand

Mr. Albert Grain, court reporter, was called and sworn and testified on behalf of the defendant.

At 11:12 a.m., the witness Heine resumed the witness stand and testified on behalf of the defendant.

At 11:42 a.m., Mr. E. U. Moses, Jr., Deputy United States Marshal, was called and sworn and testified on behalf of the defendant.

At 11:54 a.m., Mr. Thomas R. Clark, Chief Deputy United States Marshal, was called and sworn and testified on behalf of the defendant.

At 12:12 p.m., the Court ordered that this case be continued to 1:30 p.m. this day for further hearing and the United States Marshal was instructed to have Juror Clark present at that time.

At 1:45 p.m., the witness Moses was recalled and testified further.

At 1:52 p.m., Mr. Herbert E. Clark, a juror herein, was called and sworn and testified on behalf of the United States.

At 2:30 p.m., further argument was had by Mr. Ahrens.

At 3:10 p.m., argument was had by Mr. Hoddick, followed at 3:31 p.m., by Mr. Ahrens in his closing argument.

At 3:40 p.m., the Court denied said motions.

Exceptions were allowed the defendant.

At 3:52 p.m., the Court ordered that this case be continued to December 30, 1949, at 10 a.m. for sentence.

The United States District Court for the
District of Hawaii

From the Minutes of Friday,
December 30, 1949

[Title of Cause.]

On this day came Mr. Nat. Richardson, Jr., Assistant United States District Attorney, and also came the defendant herein with Mr. Katsuro Miho and Mr. John E. Ahrens of the firm Fong, Miho & Choy, his counsel. This case was called for sentence.

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for placement by him in an institution of a prison type for a period of Two Years. The Judgment and Commitment reads as follows:

No. Cr. 10,256

(Title 26 U.S.C. Sec. 2553(a))

“UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORESTUS CAVNESS,

Defendant.

[Title of Cause.]

“On this 30th day of December, 1949, came the attorney for the government and the defendant

appeared in person and by counsel Katsuro Miho and John E. Ahrens.

“It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by jury of the offense of knowingly, wilfully, unlawfully and feloniously purchasing capsules of heroin and grains of cocaine, said heroin and cocaine not then and there being in the original stamped package or from the original stamped package, in violation of section 2553(a), Title 26, United States Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

“It Is Adjudged that the defendant is guilty as as charged and convicted.

“It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

“It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. FRANK McLAUGHLIN,
U. S. District Judge.

/s/ WM. F. THOMPSON, JR.,
Clerk.”

Notice of Appeal was given by Mr. Miho.

Later in chamber, upon request of Mr. Miho, mittimus was ordered stayed for ten days and conditioned upon written consent of the bondsman herein for continuation of the appearance bond until that time.

District Court of the United States for the
District of Hawaii Division

No. Cr. 10,256

(Title 26 U.S.C. Sec. 2553(a))

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORESTUS CAVNESS,

Defendant.

JUDGMENT AND COMMITMENT

On this 30th day of December, 1949, came the attorney for the government and the defendant appeared in person and by counsel Katsuro Miho and John E. Ahrens.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by jury of the offense of knowingly, wilfully, unlawfully and feloniously purchasing capsules of heroin and grains of cocaine, said heroin and cocaine not then and there being in the original stamped package or from the original stamped

package, in violation of section 2553(a), Title 26, United States Code, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the Commitment of the defendant.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

The Court recommends commitment to:

/s/ WM. F. THOMPSON, JR.,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant:

ORESTUS CAVNESS

3811 Leahi Avenue
Honolulu, T. H.

Name and address of Appellant's attorneys:

FONG, MIHO & CHOY

Suite 202, Alakea Building
Alakea and King Streets
Honolulu 13, T. H.

Offense:

Unlawful purchase of a derivative of cocoa leaves, to wit: Eight (8) capsules, each containing cocaine, which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26 U.S.C.

Concise statement of judgment:

On December 30, 1949, after trial by jury on a plea of not guilty by the defendant, a judgment was entered pursuant to a verdict of guilty found by the jury in the above-entitled case on December 14, 1949. The Defendant above named was found guilty of the offense as charged, judgment being entered accordingly, and the Defendant above named was

sentenced to be confined in prison for a term of two (2) years. Bail for the Defendant, having previously been set in the amount of One Thousand Dollars (\$1,000.00), was ordered continued for ten (10) days from the judgment of the above-entitled court pending possible appeal.

I, Orestus Cavness, the above defendant and appellant, by my attorneys, Fong, Miho & Choy, hereby give notice of appeal, and do hereby appeal to the United States Circuit Court of Appeals, Ninth Circuit, from the above-stated judgment.

Dated at Honolulu, T. H., this 9th day of January, A.D. 1950.

ORESTUS CAVNESS,
Defendant.

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ JOHN E. AHRENS.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

ELECTION OF DEFENDANT

Judgment in the above-entitled action having been rendered on December 30, 1949, the Defendant having been sentenced to serve in prison for a term of two (2) years and an appeal having been noted in the above-entitled action on January 9, 1950, the

Defendant hereby declares that he does elect not to commence service of the sentence.

Dated at Honolulu, T. H., this 9th day of January, A.D. 1950.

ORESTUS CAVNESS,
Defendant.

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ JOHN E. AHRENS.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

BOND

Know All Men by These Presents:

That we, Orestus Cavness, as Principal, and Fong Hing and Lizzie Fong Hing, as Sureties, are held and firmly bound unto the United States of America in the Full Sum of \$2,500.00 for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment and sentence were made and entered against Orestus Cavness, Defendant above named, and

Whereas, notice has been given of appeal to the

United States Circuit Court of Appeals for the Ninth Judicial Circuit, to secure a reversal of said judgment and sentence, and

Whereas, the Honorable Frank J. McLaughlin, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of \$2,500.00 pending said appeal,

Now, Therefore, the condition of the above obligation is such that if the said Orestus Cavness shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the Judgment and sentence made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above-bounden Principal and Sureties have hereto affixed their hands this 9th day of January, 1950.

/s/ ORESTUS CAVNESS,
Principal.

/s/ FONG HING,
Surety.

/s/ LIZZIE FONG HING,
Surety.

Taken and acknowledged before me this 9th day of January, 1950.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States
District Court.

Territory of Hawaii
City and County of Honolulu—ss.

Fong Hing, being first duly sworn on oath, deposes and says that he is the Fong Hing named as a Surety and who filed the foregoing Bond and that he is worth the sum of \$5,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me this 9th day of January, 1950.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States
District Court.

Territory of Hawaii

City and County of Honolulu—ss.

Lizzie Fong Hing, being first duly sworn on oath, deposes and says that she is the Lizzie Fong Hing named as a Surety and who filed the foregoing Bond and that she is worth the sum of \$5,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LIZZIE FONG HING.

Subscribed and sworn to before me this 9th day of January, 1950.

[Seal] /s/ E. C. ROBINSON,
Deputy Clerk, United States
District Court.

Approved as to Form:

/s/ HOWARD K. HODDICK,
Asst. U. S. Attorney.

Approved as to the Amount and Sufficiency of
Surety:

/s/ J. FRANK McLAUGHLIN,
Judge, United States District
Court.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

COST BOND

Orestus Cavness, Appellant herein and Caesar Lopez Surety, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves and each of them, their and each of their heirs, executors and administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), that the Appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said Surety hereby irrevocably appoints the Clerk of this Court as his agent upon whom any papers affecting his liability on this undertaking may be served.

Signed, sealed and delivered this 19th day of January, 1950.

/s/ ORESTUS CAVNESS.

/s/ CAESAR LOPEZ.

Approved:

/s/ HOWARD K. HODDICK,

Asst. United States Attorney.

Territory of Hawaii,

City and County of Honolulu—ss.

Caesar Lopez, being first duly sworn, on oath, deposes and says that he is the Caesar Lopez named as

a Surety and who filed the foregoing Bond and that he is worth the sum of Two Hundred Fifty Dollars (\$250.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ CAESAR LOPEZ.

Subscribed and sworn to before me this 19th day of January, 1950.

[Seal] /s/ TAMIE M. HIRAI,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires March 19, 1953.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF
RECORD ON APPEAL

In making up the transcript of record on appeal to the U. S. Circuit Court of Appeals for the 9th Circuit in the above-entitled cause, you will please include the following:

Indictment filed September 15, 1949.

Affidavit and Search Warrant.

Clerks' minutes of December 5, 7, 8, 9, 12, 13, 14, 29, and 30, 1949.

Official reporter's transcript of evidence taken and proceedings had during the trial.

Defendant's motion for the suppression of evidence and affidavit filed on December 5, 1949, in open court.

Official reporter's transcript of all testimony relative to the affidavit, on which the search warrant was based, taken during the hearing on the motion for suppression of evidence.

Alternative motion for new trial filed December 19, 1949.

Clerk's minutes of December 29, 1949.

Official reporter's transcript of testimony taken on December 29, 1949.

Judgment commitment and sentence of the Court.

Notice of appeal filed January 9, 1950.

Election of Defendant filed January 9, 1950.

Bond filed January 9, 1950.

Cost Bond filed January 20, 1950.

This Designation of Record on Appeal filed February 15, 1950.

Dated at Honolulu, T. H., this 15th day of February, A.D. 1950.

ORESTUS CAVNESS,

Defendant.

By FONG, MIHO & CHOY,

His Attorneys.

By /s/ JOHN E. AHRENS.

[Endorsed]: Filed February 15, 1950.

In the United States District Court for the
Territory of Hawaii

Criminal No. 10,256

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ORESTUS CAVNESS,
Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on Decem-
ber 5, 1949,

Before: Hon. J. Frank McLaughlin,
Judge, and a Jury.

Appearances:

HOWARD K. HODDICK, ESQ.,
Assistant U. S. Attorney, appearing for
Plaintiff;

NAT RICHARDSON, JR., ESQ.,
Assistant U. S. Attorney, appearing for
Plaintiff;

KATSURO MIHO, ESQ.,
Of the Law Firm of Fong, Miho & Choy,
Appearing for Defendant;

JOHN AHRENS, ESQ.,
Of the Law Firm of Fong, Miho & Choy,
Appearing for Defendant.

The Clerk: Criminal No. 10,256, United States of America versus Orestus Cavness; case called for trial.

(A jury was impanelled and sworn to try the case.)

The Court: Very well. Gentlemen of the jury, I will tell you now and without doubt frequently during the course of this trial that while engaged in your office as jurors to try this case you are not to discuss it or any phase of it with anyone, including fellow jurors. Only when the evidence has been completed and you have received the Court's instructions as to the law and you retire to your jury room, then for the first time are you privileged to discuss it with anyone, and those people who will then come within the category of anyone will be your fellow jurors. Very well. We will recess until 1:15.

(The Court recessed at 12:05 p.m.)

Afternoon Session

The Court: Very well. This is Criminal No. 10,256, the United States of America versus Orestus Cavness. The parties are ready?

Mr. Hoddick: Ready for the Plaintiff.

Mr. Miho: Ready.

The Court: The jury is present and sworn. The Defendant is present. The Government may at this time proceed to make its opening statement if it so desires.

Mr. Hoddick: May it please the Court, gentle-

men of the jury, the Defendant, Orestus Cavness, was charged by the grand jury of this district on September 15, 1949, in the following words and figures:

“The Grand Jury Charges:

“That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of cocoa leaves, to wit, 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.”

Now, as you will later be instructed by the Court, the fact that an indictment has been returned against this Defendant is not to prejudice you in any manner against him or lead you either to determine his guilt or innocence. That is something for you to determine from the evidence adduced at the trial of this case. And on that score the indictment is entirely immaterial.

The Government will adduce evidence which will show that on July 19, 1949, at about 5:40 p.m., the Acting District Supervisor for the Bureau of Narcotics, Mr. Wells, who is [2*] sitting here on my left, accompanied by other police officers from the Honolulu Police Department, endeavored to serve a search warrant on the Defendant at 3811 Leahi Avenue; that the Defendant resisted the service of

* Page numbering appearing at top of page of original Reporter's Transcript.

this search warrant; and that in the course of endeavoring to make the service upon the Defendant it was noted that Mr. Cavness tried to destroy, in fact, tried to swallow a Vicks inhaler tube; and in the course of that struggle the inhaler tube was broken, and from the inhaler tube white particles were seen to fall to the ground.

The Defendant, Mr. Cavness, was finally subdued and taken into the house for the purposes of the search. In fact, he invited the officers to come in there, apparently trying to get them away from the spot where the struggle took place. A couple of the other officers stayed outside and in looking over the ground where the struggle had occurred they found these white particles that consisted of capsules. There were eight of them.

Inside of the house—and we will introduce evidence to prove this—the searching party under Mr. Wells' leadership turned up a Vicks inhaler tube in which the inside portion, a sort of—I expect you are all familiar with Vicks inhaler tubes—the inside portion had broken off so that what you actually had was the cap with the cover and the little portion that screws in the bottom. That was found inside the [3] house. Also found inside the house were 29 gelatine capsules, empty. Later the eight capsules which contained a substance believed by Mr. Wells to be cocaine or some other drug were turned over to a Customs Bureau of Chemists, to a chemist—and we will put him on the stand and he will testify that the contents of those capsules was cocaine.

That in brief is the Government's case, and we are ready to proceed at this time, your Honor.

The Court: Does the Defense wish at this time to make an opening statement?

Mr. Miho: The Defense wishes to reserve its opening statement, your Honor.

The Court: You may do so. You may call the first witness for the Government.

Mr. Hoddick: I don't know whether Defense Counsel desires it or not, but there are quite a number of Government witnesses present in the courtroom, and perhaps he would like to have us exclude all witnesses except the one testifying on the stand.

Mr. Miho: I didn't know that the officers and the witnesses were present in court when the opening statement was made, if your Honor please. I presume that the Defendant should have asked that the rule be invoked at that time. But I notice, in fact, the whole courtroom is practically filled up with the officers who will testify, and I would [4] like to have the rule invoked.

The Court: Very well.

Mr. Hoddick: I would like to have an exception as regards to Mr. Wells.

The Court: That is the rule. Very well, pursuant to the rule all parties who are to be, or all persons who are to be witnesses in this case, with the exception of one for each side, are excluded from the courtroom until they have testified. Very well.

Mr. Hoddick: Mr. Wells, will you take the stand, please.

WILLIAM K. WELLS

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: William K. Wells; age, 57 years; occupation, Acting District Supervisor for the Bureau of Narcotics for the Territory of Hawaii.

The Court: You live here in Honolulu?

The Witness: Born and raised in Honolulu, yes, sir.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively? Only?

The Witness: Yes, sir. [5]

By Mr. Hoddick:

Q. Mr. Wells, if you will speak loud enough so that all the members of the jury and the Judge can hear you—how long have you been with the Bureau of Narcotics? A. Twenty-eight years.

Q. And how long have you been Acting District Supervisor of the Bureau of Narcotics?

A. Since 1938.

Q. What was your occupation before you went to the Bureau of Narcotics, Mr. Wells?

(Testimony of William K. Wells.)

A. I was in France two years in the Army prior to that.

Q. And prior to that you were in school?

A. No, sir. I was working for my dad in the automobile business.

Q. During the course of your experience with the Bureau of Narcotics, have you had occasion to make many—and I will use the term advisedly—many raids?

A. Yes, sir.

Q. And in the course of those raids have narcotic substances been turned up?

A. Yes, sir.

Q. As a result thereof, are you familiar with narcotics?

A. Yes, sir.

Q. Are you able to distinguish one narcotic from another?

A. It all depends. If it is powdered morphine, at times.

Q. Pardon?

A. Powdered morphine, which is very fine, sometimes I can't tell the difference between powdered morphine and other fine powder. I have to use acid tests on it.

Q. But there are certain lay tests which you know by which you can tell one narcotic from another, or whether something is a narcotic?

A. Yes, sir.

Q. Do you know the Defendant in this case, Mr. Cavness?

A. I do, sir.

Q. And have you ever had occasion to obtain a warrant for the search of his premises?

(Testimony of William K. Wells.)

A. Yes, sir.

Q. And more than once? A. Just once.

Q. And when was that warrant obtained?

A. On July 12, 1949.

Q. And did you make a search of his premises?

A. On July 19, 1949, I tried to serve the search warrant on Mr. Cavness when he——

Q. Well, now, just a second. Did you make a search of the premises? [7]

A. After I served the search warrant on him.

Q. Well, now, will you relate the circumstances which led up to your making this search to the jury and to the Court?

A. On July 19, 1949, accompanied by then Captain Whitford, Sergeant Al Sousa and Richard Sasaki and Officer Paul Shaffer——

Q. All those men are with the Honolulu Police Department?

A. Yes, sir, who were in the house across from Mr. Cavness at 3812 Leahi Avenue for observation purposes. At 3:35—at 3:55 p.m. I saw Mr. Cavness come out, come up to the house with a colored woman. He then walked to the mail box, looked into the mail box and walked back into the yard, conversed with this colored woman for about a minute or so, and the colored woman walked back into Leahi Avenue. Mr. Cavness got into his Hudson sedan, H-5931, and proceeded Ewa on Leahi Avenue.

At about 5:38 p.m. I observed Cavness driving

(Testimony of William K. Wells.)

the same car on Leahi Avenue, coming from the Ewa direction, and he drove and parked into his garage.

Q. One moment. Mr. Wells, this Leahi Avenue is in the City and County of Honolulu?

A. Yes, sir.

Q. Territory of Hawaii? [8]

A. Yes, sir. I came out from the house across the street, followed by the officers, and proceeded towards Mr. Cavness. At that time he had left the front door open, and he had his left leg out. I went out and showed him my badge and told him I was a Federal narcotics agent and had the search warrant to search his premises. Mr. Cavness—at the same time talking to him I saw he had his right hand parked—I mean the top part of a Vicks inhaler tube. He had it clutched in his right hand. Mr. Cavness then shoved me with his left hand.

Q. Did he shove you hard?

A. Quite hard. He gave me a good push. And I grabbed his left hand. I was then assisted by Sergeant Sousa who was in the back of me.

Q. When you grabbed his left hand, did that result in his being pulled out of the car?

A. I think so. And then Mr. Cavness fell on the ground on his knees. We got him up and he tried to get away from us, to run towards the back of the, I would say the back of his yard there. Then Mr. Whitford came to our assistance and he then fell to the ground again. He got up and

(Testimony of William K. Wells.)

then we were assisted by the other officers. That was Paul Shaffer, Arthur Abbey and Sasaki. We struggled there for about three, four minutes. Then we finally got him down on his stomach, and I had a hold of his left hand. By his left wrist, I [9] would say. And Mr. Whitford had his right hand, and I heard Mr. Whitford—they were trying to get his hand open. They couldn't. So Mr. Abbey struck Mr. Cavness' hand several times and it opened. And Mr. Whitford recovered part of the inhaler tube. And I had Mr. Abbey strike Mr. Cavness' left hand to open it and a small object at the time dropped from his hand, and——

Mr. Miho: If your Honor please, at this time I'd like to renew my request on the question of evidence.

Mr. Hoddick: The Government hasn't endeavored to introduce any evidence as yet except for Mr. Wells' testimony.

The Court: The motion is on file, and when it comes up and it is something that it is applicable to, and you have to watch that, I will be glad to pass on it. But at the moment I haven't any knowledge of its applicability.

Q. (By Mr. Hoddick): Please proceed, Mr. Wells.

A. Mr. Cavness at that time said, "Take me in." We got him up on his feet and he was handcuffed with his arms in the back.

Q. Excuse me, Mr. Wells. He had stopped

(Testimony of William K. Wells.)

struggling at this point? A. At the time.

Q. And were you then able to serve the search warrant on him? [10]

A. No, sir, he wanted me to take him into the house. He said, "Take me into the house." So I took him into the house and served the search warrant on Mr. Cavness.

Q. Where did you serve it?

A. Right in the living room.

Q. That was immediately after you got inside?

A. Yes, sir. After I served the search warrant on him, Mr. Arthur Abbey called and said, "Billy, I found some stuff." Then I took Mr. Cavness outside and he showed me the top piece of a shattered inhaler, Vicks inhaler tube with two capsules of white substance stuck to it. Then Mr. Shaffer found six capsules of white substance.

Mr. Miho: Just a moment, please. I'd like to object to any conclusions on the part of this witness unless he himself has seen that. I ask that the answer be stricken.

The Court: Yes. What somebody else found, unless it is within your knowledge, isn't for you to testify.

Q. Were you present when Mr. Shaffer found these six capsules? A. Yes, sir.

Q. Were you there when he picked them up from the ground?

A. Yes, sir. I mean, he was in the house and he came out with me.

(Testimony of William K. Wells.)

Mr. Hoddick: I move that it is a matter within the [11] witness' own knowledge and it is not hearsay, and he can testify to what Mr. Shaffer——

Q. Describe how Mr. Shaffer came in possession of the six capsules, if you saw that happen?

Mr. Miho: If your Honor please, that would be purely hearsay as to what Shaffer said or did.

The Court: Part of the prior answer, that he said somebody found something, may go out.

Mr. Hoddick: "Found" is a conclusion, and that properly should be stricken.

The Court: All you, Mr. Wells, can testify to is what you know of your own knowledge and not what someone told you. Start again.

Q. Now, Mr. Wells, you said Mr. Abbey called you outside and showed you the top of a Vicks inhaler tube with two capsules containing some white substance adhered to it?

A. He put it back on the ground where he had found it. I picked it up and examined it closely. I saw two capsules stuck to it.

Q. Now, Mr. Shaffer also had six capsules?

A. Then it was given to Mr. Abbey, and Shaffer said, "Well, look what's here." So I turned around and saw him pick up six capsules from the ground, and Mr. Shaffer also said, "Well, here's some shattered pieces of inhaler tube." And he picked it up. And I took Mr. Cavness back into the [12] house and we proceeded to search the premises, and every room that we searched we had Mr. Cavness with us.

(Testimony of William K. Wells.)

Q. And was anything found in the house?

A. Well, there were some—I didn't see—Mr. Marcotte found 29 capsules of——

Mr. Miho: Oh, your Honor please, I move that that answer be stricken. It is just as bad for him to say that—he is an old-timer; he knows what it is all about. Let's not slip any evidence by innuendos.

The Court: That may go out. The jury is instructed to disregard it.

Q. (By Mr. Hoddick): Mr. Wells, did you assign certain officers to search the interior of the house?

A. We all searched the interior of the house. I instructed them to be sure to have Mr. Cavness present.

Q. Now, did any of these officers deliver anything to you? A. At the Police Station.

Q. I believe you brought with you an envelope containing the various articles which were picked up at Mr. Cavness' house. A. Yes, sir.

Q. Do you have that envelope with you? (Witness points to an envelope on counsel table.) Would you open that, [13] Mr. Wells, and identify each of those articles as to the source from which you obtained it?

Mr. Miho: Your Honor, I'd like to object to that on the ground that no proper foundation has been made to introduce anything along this line. A search warrant merely says about searching something included in there. Unless more proper

(Testimony of William K. Wells.)

foundation is laid, I believe it is objectionable for Counsel to introduce anything at this time.

Mr. Hoddick: We are not endeavoring to introduce this evidence at this time. We are merely endeavoring to lay a foundation so that it will be proper to have it admitted.

The Court: I know of no evidence that is being offered.

Q. (By Mr. Hoddick): Now, you stated that Mr. Abbey—— A. Yes, sir.

Q. ——had picked up an inhaler tube to which two capsules were stuck? A. Yes, sir.

Q. Or part of an inhaler tube? Do you have that article with you?

A. Yes, sir. (Witness opens an envelope.)

Q. You might leave it in the envelope. Did you leave that—where was this article delivered to you?

A. Down the vice squad in the Honolulu Police Department. [14]

Q. At the vice squad office? A. Yes, sir.

Q. And is it still in the same condition as it was when you received it?

Mr. Miho: If your Honor please, I object to that. There is no proper foundation laid that he would know, unless he can follow it up step by step. How does he know unless he put it in something, some definite container, or some receptacle? But just to say that he received it and for him to come to the same conclusion that it is in the same condition as he found it——

(Testimony of William K. Wells.)

Mr. Hoddick: I will withdraw that question.

Q. Mr. Wells, has that article been out of your possession since you received it? A. Yes, sir.

Q. And I am referring now to the part of the Vicks inhaler tube with the two capsules stuck thereto. A. Yes, sir.

Q. Did you deliver it to somebody else's possession?

A. On July 22, 1949, I delivered the two capsules that stuck to the piece of the inhaler tube and the six capsules to Mr. G. J. Carr, U. S. Customs chemist.

Q. Did you detach the two capsules from the piece of Vicks inhaler tube? A. No, sir. [15]

Q. When you received these two capsules and the part of Vicks inhaler tube from Mr. Abbey, did you put it in an envelope? A. Yes, sir.

Q. Did you put your initials on that envelope?

A. Yes, sir.

Q. Is it the same envelope in which the top is now contained with the two capsules?

A. Yes, sir.

Mr. Miho: Your Honor please, I still object to that answer and move it be stricken unless he can show that he followed the envelope from the time the envelope was out of his possession. The fact that it is in the same envelope means nothing, your Honor.

Mr. Hoddick: If you will just permit me to go ahead a few minutes, Mr. Miho, I think we can clear this up.

(Testimony of William K. Wells.)

The Court: Wait a minute. Read the question and answer.

(The reporter read the last question and answer.)

The Court: There is a missing link. As I get it, he received something at the Police Station and put it in an envelope, and at a later date turned it over to a chemist.

Mr. Hoddick: We will put on the chemist later and show that the contents are the same at the time that Mr. Wells delivered it to him, that they were the same. I want to recall Mr. Wells after the chemist to show that there was [16] no further change; as long as he had possession of these articles, they remained in a constant form.

The Court: What did he get back from the chemist?

Mr. Hoddick: That we will show by putting the chemist on, that it was the same thing that he gave to the chemist. But as far as he is concerned, the articles contained in that envelope had not been changed by him or by anybody else as long as he had those articles in his possession. That is our offer here. It is not time yet to offer these articles in evidence. I have to show the full groundwork, and we intend to do so.

The Court: Well, it is confusing to me as to just what you are doing, whether the witness is being asked to testify as to what happened to these

(Testimony of William K. Wells.)

things while in his possession, if anything, or whether you are trying to follow it through to the chemist and back to Mr. Wells. I don't know.

Mr. Hoddick: Just while they were in his possession, what he did with them and what he did with them after these articles were returned.

The Court: All right. Clear that up.

Q. (By Mr. Hoddick): Now, you stated you put the two capsules which were stuck to the top of the Vicks inhaler tube in an envelope, that you put your initials on that envelope, and that you delivered that envelope with the contents to Mr. Carr, the [17] Customs chemist? A. Yes, sir.

Q. Now, while those two capsules and the top of the Vicks inhaler tube were in your possession before delivery to Mr. Carr, did you make any change in them? Did you take them apart or did you alter the contents of the capsules?

A. No, sir.

Q. In other words, you delivered those articles to Mr. Carr in the same condition in which you received them from Mr. Abbey? A. Yes, sir.

Q. Now, is that envelope that you have up there beside you on the stand, or is that envelope the same one in which you put the two capsules and the Vicks inhaler tube originally?

A. Including the six capsules.

Mr. Miho: Your Honor please, I object to that. There is nothing about six capsules. All he can testify to is to what he actually delivered so far

(Testimony of William K. Wells.)

as the envelope is concerned, what was placed in it, and what he received back. As to his conclusions as to what was in it, whether it is the same or not, is certainly his opinion or conclusion.

The Court: Mr. Wells, with respect to this envelope into which you testified you put two capsules and the top of a Vicks inhaler tube——

The Witness: And six capsules. [18]

The Court: ——you also put something else in that envelope?

The Witness: Yes, sir, six capsules.

The Court: Well, you keep jumping around. It is hard to follow you, to follow it through. It is a little confusing to us who don't know anything about it. It is probably as clear as crystal to you, but you have got to make it clear to us. Let's go back to the time you said you got something at the Police Station. I recall you saying that you received the two capsules attached to the top of a Vicks inhaler tube at the Police Station.

The Witness: Yes, sir.

The Court: And was it there that you also received something else?

The Witness: Yes, sir, six capsules of suspected cocaine. I placed the six capsules and the two capsules in this envelope.

Q. (By Mr. Hoddick): Was that at the Police Station or the vice squad office?

A. Vice squad office in the Honolulu Police Station. And I further received other evidence down at the Honolulu Police Station.

(Testimony of William K. Wells.)

The Court: Let's not jump around. Let's stick to what we are being asked about. [19]

Q. Now, Mr. Wells, is that envelope the envelope in which you placed the six capsules and the top of the Vicks inhaler tube with the two capsules stuck thereto? A. Yes, sir.

Q. Did you put anything else in that envelope?

A. No, sir.

Q. And you later delivered that envelope to Mr. Carr?

A. Yes, sir, on July 22, 1949. And I received it back——

Q. Wait a minute. At the time you delivered that envelope to Mr. Carr, were the contents in the same condition as far as any changing on your part or as they were when you received them down at the vice squad office?

Mr. Miho: Your Honor, I object to that. It is merely his conclusion. He cannot testify as to something in an envelope. All he can testify is to what he put in there and describe those objects. But for Counsel to ask him what the contents of those things that he has already placed in an envelope, unless he can see through the envelope, it is merely asking for a conclusion from the witness.

Q. (By Mr. Hoddick): Mr. Wells, did you seal the envelope after you put the articles in it?

A. Yes, sir.

Q. And what did you do with the envelope during the [20] time it was in your possession?

(Testimony of William K. Wells.)

A. I placed it in another big envelope and—an evidence envelope put out by the Bureau of Narcotics—and I sealed it and put it in the strong room of my office. And on July 22, 1949, I broke the seal of the original envelope, took this envelope with the two capsules of cocaine and six capsules to Mr. Carr, the chemist, for analysis. He returned the envelope to me on July 25, 1949, sealed.

Q. And this is the first time you have opened that envelope since it was returned?

A. That's right, sir.

Q. Does anybody else have access to what you described as a strong room?

A. Strong room. No, sir.

Q. At your office? A. No, sir.

Q. And you did not in any manner tamper with it, change the contents?

Mr. Miho: Just a moment.

The Court: Wait a minute. Let him finish his question. Then object.

Mr. Miho: I'm sorry.

Q. (By Mr. Hoddick): Mr. Wells, did you at any time change the contents of these capsules during the time that they were in your [21] possession, from the time you received them at the vice squad until the time that you took them down to Mr. Carr? A. No, sir.

Q. You delivered those to Mr. Carr on July 22?

A. Yes, sir.

Q. And did Mr. Carr return that envelope to you at a later date?

(Testimony of William K. Wells.)

A. He returned the same envelope to me on July 25, 1949.

Q. How do you know that it is the same envelope?

A. I have my initials on it, W. K. W.

Q. And the envelope was sealed when he returned it?

A. Yes. It was sealed by Mr. Carr.

Q. And what did you do with the envelope?

A. I placed it in another evidence envelope, sealed it, and placed it in my strong room.

Q. And when did you next move it?

A. This morning before I came up to the Court here.

Q. And this was the first time you had broken the seal that Mr. Carr—this is the first time you had broken the seal from that envelope since you received it from Mr. Carr?

A. Yes, sir.

Q. And what were the contents, what are the contents now?

A. By that you want me to—— [22]

Q. It is still sealed?

A. I started to rip it.

Q. I believe it is sealed. That is all right.

The Court: Let the record show that originally when you first spoke to the witness about the envelope, I got the impression you wanted him to open it, and he started to tear it open and tore just a corner and was stopped. I think there was

(Testimony of William K. Wells.)

an objection at that time. So it is quite clear that that is what has happened here in open court. So the envelope is not now sealed. It has a torn corner which happened right here. Go ahead.

Mr. Hoddick: Will you give me that envelope please, Mr. Wells. I would like to have this marked for identification purposes.

The Court: It may be marked for identification.

The Clerk: United States "A" for identification.

(The envelope referred to was marked "U. S. Exhibit A for Identification.")

Q. (By Mr. Hoddick): Now, Mr. Wells, what else was delivered to you by these searching officers down at 3811 Leahi Avenue on July 19, 1949, besides the six capsules and the top of the inhaler tube, the two capsules stuck thereto?

A. I didn't receive any of the evidence out there. I received it from the vice squad office. [23]

Q. What did you receive at the vice squad office?

A. From Mr. Hugh Whitford I received part of the Vicks inhaler tube, and from Mr. Paul Shaffer—

Q. Now, what did you do with that part of the Vicks inhaler tube that you received?

A. I placed it in an envelope.

Q. In a separate envelope?

A. In a separate envelope.

(Testimony of William K. Wells.)

Q. And did you put your initials on that envelope? A. Yes, sir.

Q. Did you seal that envelope?

A. I sealed it with one of those——

The Court: Stickers?

The Witness: Stickers.

The Court: Labels?

The Witness: Labels, whatever you call it.

Q. And did you put that in your strong box?

A. I placed it in the original envelope and placed it in my strong room.

Q. And have you delivered that to anybody else, or has it been out of your possession since the time you received it?

A. No, sir. It's been in my possession all the time.

Q. And it's been in your strong room until you brought it into the court here today? [24]

A. Yes, sir.

Mr. Hoddick: I'd like to have that marked for identification purposes, your Honor.

The Court: It may be marked for identification.

The Clerk: U. S. "B" for identification.

(The envelope referred to was marked
"U. S. Exhibit B for Identification.")

Q. (By Mr. Hoddick): Now, what else was delivered to you by the searching officers on July 19, 1949?

(Testimony of William K. Wells.)

A. Also received four shattered pieces of Vicks inhaler tube from officer Paul Shaffer.

Q. And what did you do with those pieces?

A. I placed it—no, he placed it in an envelope himself.

Q. In your presence?

A. In my presence. And sealed it and handed it to me.

Q. And you put your initials on it?

A. Yes, sir.

Q. Did he put his initials on it?

A. Yes, sir.

Q. In your presence? A. In my presence.

Q. And what did you do with that envelope?

A. I placed it in the gummed evidence envelope. [25]

Mr. Miho: What was that?

The Witness: Placed it in a Bureau of Narcotics evidence envelope, one of these big ones here.

Q. (By Mr. Hoddick): And then where did you put it? A. Put it in my strong room.

Q. And has that been removed from your strong room from the time you put it there until this morning? A. Until this morning.

Q. Therefore the contents of that envelope are the same as when Mr. Shaffer placed the parts of the inhaler tube in it? A. Yes, sir.

Mr. Hoddick: May we have that marked for identification, your Honor.

(Testimony of William K. Wells.)

The Court: It may be marked for identification purposes as——

The Clerk: U. S. "C" for identification.

(The envelope referred to was marked
"U. S. Exhibit C for Identification.")

Q. Now, what other articles were delivered to you and by whom and where?

A. Abbey, a small piece of Vicks inhaler tube.

Q. This is another piece? This is a piece different from the one to which the two capsules were stuck? [26]

A. That's right.

Q. And where did he deliver it to you?

A. At the vice squad office of the Honolulu Police Department.

Q. And that was on July 19, 1949?

A. Yes, sir.

Q. And what did you do with them?

A. I placed it in an envelope.

Q. And the envelope was sealed?

A. With a label.

Q. Did you put your initials on the envelope?

A. Yes, sir.

Q. Are they there? (Showing an envelope.)

A. Yes, sir.

Q. And did officer Abbey put his initials on the envelope in your presence? A. No, sir.

Q. What did you do with the envelope?

A. I placed it in a big Bureau of Narcotics evidence envelope and placed it in my strong room.

(Testimony of William K. Wells.)

Q. And did you leave it there until you brought it down to the courtroom today?

A. Yes, sir.

Q. You have never opened this envelope since the time that you put— [27]

A. No, sir.

Q. —that you put the inhaler tube in it?

A. No, sir.

Mr. Hoddick: I'd like to offer this, to have this marked for identification purposes.

The Court: It may be marked.

The Clerk: U. S. "D" for identification.

(The envelope referred to was marked
"U. S. Exhibit D for Identification.")

Q. (By Mr. Hoddick): Mr. Wells, did you receive any other articles from the searching officers on that day?

A. Yes, sir, from officer Harry Pestano I received a Vicks inhaler tube with the inside broken off, only the base remaining.

Q. And where did he deliver that to you?

A. At the vice squad office of the Honolulu Police Department.

Q. And did you put that in an envelope?

A. Yes, sir.

Q. Did you seal the envelope?

A. Put a label on it.

Q. Put your initials on the envelope?

A. Yes, sir.

Q. Is that the envelope that you put—(Showing an [28] envelope to the witness).

(Testimony of William K. Wells.)

A. Yes, sir.

Q. —that you put the tube found by Pestano in? A. Yes, sir.

Q. And what did you do with it after you left the vice squad office?

A. I took it up to the office of the Bureau of Narcotics, left it there and the following morning I placed it in this envelope and put it in an evidence envelope and placed it in the strong room of my office.

Q. And when did you first remove it from the strong room in your office?

A. This morning.

Mr. Hoddick: I'd like to have that marked for identification purposes also, your Honor.

The Court: It may be marked, it may be marked for identification as——

The Clerk: U. S. "E" for identification.

(The envelope referred to was marked "U. S. Exhibit E for Identification.")

Q. Was there anything else delivered to you?

A. By officer Roger Marcotte, a box containing 29 capsules, containing 29 empty gelatine capsules, No. 5.

Q. What do you mean "No. 5"?

A. Well, capsules have different numbers, No. 5, No. [29] 4, No. 3. No. 5 are the small ones.

Q. The number is indicative of their size?

A. Yes, sir.

(Testimony of William K. Wells.)

Q. And what did you do with these gelatine capsules? A. I just put a label around it.

Q. You sealed the box shut? A. Yes.

Q. And then what did you do with them?

A. I placed it in a gummed evidence envelope, and put it in the strong room, in the strong box and placed it in the strong room.

Q. And did you take them out of the strong room prior to this morning?

A. I took the second envelope that I placed all the evidence in from my strong room this morning and brought it up to court.

The Court: Second envelope?

The Witness: Yes, your Honor. This is the first envelope. On July 22nd I broke the seal and took the two capsules that are stuck to the piece of the inhaler tube and the six capsules——

The Court: To the chemist?

The Witness: ——to the chemist, yes, sir.

The Court: That is——

The Witness: That is the original envelope. [30]

The Court: Has this been marked for identification?

Mr. Hoddick: That is not marked for identification purposes.

The Court: Then these other things that you have been talking about were in a separate evidence envelope?

The Witness: In this one. (Indicating.)

The Court: That's the big one, the big envelope that you tore open here today?

(Testimony of William K. Wells.)

The Witness: Yes, sir.

Q. (By Mr. Hoddick): Then the contents of that box are the same, Mr. Wells, as at the time when you received them, received the box from officer Marcotte? A. Yes, sir.

Mr. Hoddick: I'd like to have the box marked for identification purposes.

The Court: It may be marked for identification.

The Clerk: U. S. Exhibit "F."

(The box referred to was marked "U. S. Exhibit F for Identification.")

Q. Now, Mr. Wells, all of these articles which you received from the searching officers on July 19th, you put in six different envelopes, small envelopes, is that right? Well, if you don't remember——

A. I think it's five. [31]

Q. You put them in a number of small envelopes?

A. This includes the sixth. (Indicating.) Five small envelopes.

Mr. Miho: If your Honor please, I don't like to interrupt too often but I believe Counsel should be instructed not to lead and just about put the answer in the witness' mouth.

The Court: Yes, that is true.

Q. (By Mr. Hoddick): Did you at any time, Mr. Wells, after receiving these articles from the

(Testimony of William K. Wells.)

searching officers place them in a single envelope?

A. Yes, sir.

Q. And was it ever necessary for you to take any of these articles from that single envelope?

A. Yes, sir.

Q. And when was that?

A. July 22nd, 1949.

Q. And what articles did you take from the single envelope?

A. I took the envelope containing the two capsules that were stuck to a piece of the inhaler tube and six small capsules to Mr. Carr, the Customs chemist, for analysis.

Q. And what did you do with the remaining envelopes that were in this single large envelope?

A. I placed the other articles in the original envelope until July 25, 1949, when I received the big envelope containing the capsules of cocaine and placed them——

Mr. Miho: If your Honor please, I move that all reference to cocaine and narcotics be stricken and the jury be instructed to disregard it.

The Court: That may go out. The jury is to disregard it. We are just tracing packages now.

A. (Continuing): And placed them in the second Bureau of Narcotics, Bureau evidence envelope.

Q. What did you place in the second Bureau of Narcotics envelope, evidence envelope?

A. I placed an envelope containing two cap-

(Testimony of William K. Wells.)

sules that were stuck to a piece of shattered Vicks inhaler tube, six capsules, and one envelope containing four shattered pieces of Vicks inhaler tube, one envelope containing one piece of shattered inhaler tube, one envelope containing the lower part of a Vicks inhaler tube, and another envelope containing an inhaler tube with the inside broken off, just the base remaining.

Q. In that second envelope, did you put any articles in that second envelope which you received from the officer——

A. A box containing 29 capsules of——

Q. Did you have any conversations with the Defendant, Mr. Wells, concerning the articles which you found on his [33] premises or which were found? A. I did.

Q. What did he have to say to you? First of all, where did this conversation take place?

A. This conversation took place in Mr. Whitford's office down in the vice squad. I warned Mr. Cavness of his Constitutional rights and told him he didn't have to answer any questions that were put to him. I told him at the time that I am going to question him in regard to the capsules and other evidence that was seized from his premises. He told me that he didn't want to answer any questions. I then stopped and asked him, Mr. Cavness, about the evidence that we had seized from his premises, and I asked him if he would be willing to answer questions in regard to where

(Testimony of William K. Wells.)

he was born, and so forth, and he very willingly answered those questions.

Q. Did you say, Mr. Wells, that you had a search warrant for the purpose of making this search? A. Yes, sir.

Q. And from whom did you obtain that search warrant? A. From Judge Harry Steiner.

Q. And what is his Federal capacity?

A. He is a U. S. Commissioner.

Q. And is this the search warrant which he issued? (Showing a document to the witness.)

A. That is the original of the search warrant that Judge Steiner issued.

Mr. Hoddick: Your Honor, I am not certain whether it constitutes a part of the record of the case without being admitted in evidence or not. It is in the official Court files.

Mr. Miho: I can't hear you.

Mr. Hoddick: I am not certain whether this constitutes a part of the record of this case. It is in the official Court file. Will you stipulate to it being admitted in evidence?

Mr. Miho: I'm sorry, Mr. Hoddick, that is the basis of a lot of our contentions and I cannot stipulate to that. I believe that any search warrant is absolutely worthless unless it is proven to be legal.

Mr. Hoddick: But the warrant itself is an official document and should speak for itself.

Mr. Miho: I know of no such rule of law, your

(Testimony of William K. Wells.)

Honor, that states that a piece of paper, just because it is signed by someone reported to be a Commissioner, that it is on its face recognized to be legal evidence in court.

Mr. Hoddick: The Commissioner, as I understand it, makes an official return to this Court of all warrants issued. They are then put in a file and subsequently tied in with any case that may arise therefrom. [35]

The Court: Whatever is in that file in this case is part of the record in this case.

Mr. Miho: I note an exception to your Honor's ruling.

The Court: There is nothing to except to. It is already in the file. For whatever value it is, is another question. I take it, Mr. Wells, that it was under this search warrant that you operated?

The Witness: Yes, sir.

Mr. Hoddick: I have no further questions to ask this witness.

The Court: Cross-examination?

Mr. Miho: May we have a short recess, if your Honor please? It has been an hour since we started.

The Court: All right. We will take a short recess.

(A short recess was taken at 2:15 p.m.)

(Testimony of William K. Wells.)

After Recess

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Mr. Wells, you have been a narcotics agent here in the Territory for some years, is that right, since 1938? A. I came back in 1927.

Q. You got some special training before you took the job as narcotics agent?

A. As a narcotics agent, no, sir. We didn't have [36] any training when I first went in.

Q. How far did you go to school, Mr. Wells?

A. Eighth grade.

Q. Well, did you have any chemistry courses in the eighth grade or in grammar school?

A. No, sir.

Q. Did you ever take any chemistry course?

A. No, sir.

Q. So whatever knowledge you have, as you stated to Mr. Hoddick that you have, is knowledge derived from your work as a narcotics agent?

A. Yes, sir.

Q. And whatever conclusions you draw is guess work on your part, is that right, purely guess work?

A. On testing and from instructions from my Bureau how to test morphine and heroin.

Q. On instructions? A. Yes, sir.

Q. So that when you stated a while ago that

(Testimony of William K. Wells.)

you can tell what the different types of drugs are from looking at them, and in some cases by testing it, excepting fine powdered narcotics, that is all subject to chemist, absolute chemical analysis, isn't that right? A. That's right.

Q. And what you may say by looking at some object [37] which you may think is this or that is purely guess work, is that right?

A. That's right, sir.

Q. That is the extent of your knowledge of drugs, isn't that correct? A. Yes.

Q. I presume you prepared, or your office prepared, or you know who prepared what appears to be in the Court files as a search warrant, United States of America versus Orestus Cavness.

A. Yes, sir.

Q. Did you prepare it yourself?

A. I prepared that myself, yes, sir.

Q. You typed it out yourself?

A. I wrote it in longhand and had my clerk in the office—she typed it out.

Q. What is the name of your clerk?

A. Mrs. Harriet N. Ho.

Q. This search warrant mentions a person by the name of Gerry Wilson. A. Yes, sir.

Q. You, I presume, met and talked to this person, Gerry Wilson? A. I have.

Q. And if you were instructed to produce her in Court [38] you will be able to do so?

A. No, sir.

(Testimony of William K. Wells.)

Q. And why is that, Mr. Wells?

A. Because the informer is not in the Territory of Hawaii.

Q. This Gerry Wilson is your informer?

A. It is a police informer.

Q. And how do you know that this important witness is not in the Territory of Hawaii?

A. I happened to be down in the airport when the informer left for the states.

Q. And when did he or she leave?

A. I think——

Q. Soon after this?

A. Approximately about a month after this happened.

Q. You talked to this Gerry Wilson during that one month's period between the time of the signing of this search warrant or talked to her about the search warrant, between that time and the time she left?

A. I think I talked to her on one occasion.

Q. And when was that, Mr. Wells?

A. Oh, about a couple of weeks after that.

Q. And when was it that you talked to her prior to that couple of weeks?

A. Around the latter part of June, I think, that I [39] first talked to her in the presence of two other police officers.

Q. And who were they?

A. Sergeant Alfred Sousa and Theodore Kinney.

(Testimony of William K. Wells.)

Q. And that was the only time you talked to her prior to two weeks or so after the arrest?

A. Only once I talked to her, after the arrest. I thought your question was, when was the first time I talked to her prior to the arrest?

Q. I may have confused you. When was the first time you met Gerry Wilson in your life?

A. About the latter part of June, 1946. I met the informer through police officer Alfred Sousa.

Q. When was the second time you met her?

A. That was the time I met the informer through Alfred Sousa and Theodore Kinney.

Q. In 1946? A. Yes, sir, 1949.

Q. And that was in the latter part of June, 1949? A. Yes, sir.

Q. That you had met this informer, Gerry Wilson? A. Yes, sir.

Q. Did she go by any other name or names?

Mr. Hoddick: I object, your Honor, as to what other names the informer might have gone by. It is entirely [40] immaterial in this case. I think the police are entitled to preserve, if possible, the identity of their informers. As a matter of fact, the name of Gerry Wilson does appear apparently on the search warrant. It was not possible—I would have objected originally to the introduction of the name of the informer. I think any information concerning other names has no bearing on this case.

The Court: What is the relevancy of the identity of the person?

(Testimony of William K. Wells.)

Mr. Miho: I'd like to attack—not attack but establish the legality of the search warrant, if your Honor please, and it is very important to my case to find out all we can about the things that she swore to before the U. S. Commissioner. Certainly her identity, if any, is important. How else can I attack, delve into the credibility of this person as to the truth or veracity of her statement, which is the basis of this search warrant, unless I can at least establish her identity, your Honor?

Mr. Hoddick: I don't think this is a proper time to make an attack on the search warrant itself, your Honor.

The Court: No, I don't think so either.

Mr. Hoddick: It should have been before we went into trial.

Mr. Miho: I believe it is covered by a motion for suppression of evidence. [41]

The Court: We will take that up separately at the proper time. But we are not presently concerned with the validity of that search warrant. The witness testified that pursuant to this search warrant certain things were done under that. Now, if the time comes when the officer who obtained that, when the evidence comes in, we will take up your motion squarely. But at this moment I can't see it.

Mr. Miho: May we have an exception?

The Court: Yes.

(Testimony of William K. Wells.)

Q. (By Mr. Miho): Mr. Wells, so that the only time you talked to Gerry Wilson, as you called her, your informer, was in the latter part of June?

A. I met her——

Q. Prior to the arrest?

A. ——prior to the arrest. I met her on several occasions.

Q. Well, I may have misheard you. Prior to the arrest, July 19, 1949, of this Defendant Cavness, on the strength of this search warrant, how many times had you talked to Gerry Wilson?

A. I would say about a half dozen times, maybe eight. I am not quite sure how many times.

Q. During a course of how many weeks, Mr. Wells? A. About three weeks. [42]

Q. About three weeks? Now, you have been after, trying to get something on a man named Orestus Cavness for some time, is that right?

A. Yes, sir.

Q. For how long?

A. Since October 8, 1948.

Q. And these eight or seven conversations you had with this Gerry Wilson were for the purpose of gathering information sufficient for you to get a search warrant out against the Defendant Cavness? A. Yes, sir.

Q. And solely for that purpose, is that right?

A. On this occasion, yes, sir.

Q. Now, when was the last time you talked to Gerry Wilson prior to the arrest?

(Testimony of William K. Wells.)

A. I think it was on July 12, 1949.

Q. Before Judge Harry Steiner?

A. Yes, sir.

Q. And you accompanied Gerry Wilson yourself to Judge Steiner's office?

A. No, sir. Judge Steiner came to my office.

Q. I see. And that is in the Federal Building here?

A. No, sir, it is at room 575 Alexander Young Building.

Q. I'm sorry. And Judge Steiner stepped into your office over there with, at your request? [43]

A. Yes, sir.

Q. And Gerry Wilson was present in your office? A. Yes, sir.

Q. Had you given Judge Steiner the original of this search warrant for the arrest of Cavness prior to the time the Judge showed up in your office?

A. I don't understand that question, Mr. Miho.

Q. Had you shown Judge Steiner this search warrant that you say you prepared prior to the time Judge Steiner stepped in your office?

A. No, sir. I showed it to him on July 12, 1949, when he came up to my office. I prepared the original and a copy of the search warrant.

Q. The search warrant had already been typed out and prepared before he came in, is that right?

A. That's right.

Q. And Gerry Wilson was present in your office with you? A. Yes, sir.

(Testimony of William K. Wells.)

Q. Who else was present in your office?

A. Sergeant Alfred Sousa.

Q. And who else? A. That's all.

Q. And was Sergeant Sousa present throughout the time that Judge Steiner came into your chambers? [44]

A. Yes, sir.

Q. From the beginning to the end?

A. Yes, sir.

Q. Did you have any stenographic reporters or anyone else there? A. No, sir.

Q. So that you, Judge Steiner, Officer Sousa——

A. Yes, sir.

Q. ——and Gerry Wilson were the only parties present? A. Yes, sir.

Q. And what time of the day was it that Judge Steiner came in?

A. He was supposed to be there at two o'clock and he came about, he was about five, ten minutes late.

Q. And he stayed in your office how many minutes?

A. I would say he stayed about half hour.

Q. Half an hour? A. About that.

Q. July 12th was on a Tuesday, do you recall that? A. No, sir, I don't.

Q. Do you know whether he had court that day or not? A. I really don't know.

Q. Well, I will inform you that July 12th was a Tuesday. Can you recall whether he had court that day or not?

(Testimony of William K. Wells.)

Mr. Hoddick: We will so stipulate. [45]

The Court: What, that the date is correct or that he had court on that day?

Mr. Hoddick: No, that July 12th is Tuesday.

The Court: All right.

Q. (By Mr. Miho): Now, you came in a few minutes after two o'clock?

A. To the best of my knowledge he came in after two o'clock.

Q. And he stayed in your office half hour, you think?

A. Approximately half hour or 20 minutes.

Q. What was said when he came into your office?

Mr. Hoddick: May it please the Court, I object to this general line of questioning. I don't think this is the proper time or place to try the validity of the search warrant or endeavor to establish its invalidity. I believe that there is a certain presumption of validity that goes with a search warrant. And knowing of the issuance of this search warrant—I am not speaking now as to whether the search was properly made pursuant to that warrant or not, but if an attack were to be made on the warrant it should have been made prior to the time we went to trial. And therefore I think this entire line of questioning is immaterial and not proper cross-examination.

The Court: What are you trying to do?

Mr. Miho: Certainly, your Honor, the back-

(Testimony of William K. Wells.)

ground of the [46] search warrant has a lot to do with the entire case in the sense that it is to show, let's say, for one thing the motive, if any, of Mr. Wells, the zealousness with which he went out to get the search warrant, or how he got it. It certainly has a material bearing on his credibility as a witness and the principal witness in this case for the Government.

The Court: Well, that is all right, but if you are going to attack the validity of the search warrant, the search warrant, you will have to do that separately. It is not part of this case except that the Court will hear motions. You may go ahead on the theory that you state you wish to proceed.

Q. (By Mr. Miho): Now, I presume you introduced Gerry Wilson to Judge Steiner.

A. Yes, sir.

Q. And who did the questioning, you or Judge Steiner, of Gerry Wilson?

A. Judge Steiner.

Q. Did you know at that time that Gerry Wilson was going to leave the Territory soon?

A. No, sir.

Q. You are quite sure of that?

A. Yes, sir.

Q. Do you know whether she had been a long resident [47] of the Territory or a resident of the Territory or just visiting here or not?

A. I don't know.

Q. You don't know that? You didn't know it at that time either?

A. No, sir.

(Testimony of William K. Wells.)

Q. And Judge Steiner questioned Gerry Wilson?

A. Yes, sir.

Q. Of course Gerry Wilson knew that Judge Steiner was coming there?

A. Yes, sir.

Q. And for what purpose?

Mr. Hoddick: That calls for a conclusion on the part of the witness. He doesn't know what Gerry Wilson knew.

Mr. Miho: I will reframe the question.

Q. You had Gerry Wilson prepared for this interview, did you not?

A. Yes, sir.

Q. Evidently Gerry Wilson is a dope addict herself from this——

Mr. Hoddick: Objection. It is immaterial what Gerry Wilson is or was.

Mr. Miho: I will withdraw the question.

Q. Is she a negro person?

Mr. Hoddick: I object to that, too, on the grounds that [48] it is immaterial.

Mr. Miho: I will withdraw the question.

Q. How is it, Mr. Wells, that after eight or seven interviews in the course of three weeks you did not get a search warrant prior to the last, prior to July 12th, if you talked to her, Gerry Wilson, seven or eight times prior to July 12th, the day of the search warrant?

A. Yes, sir.

The Court: That is not in evidence. That is part of the record in the case but it is not an exhibit to be shown to the jury at this time.

Mr. Miho: All right.

Q. Did you answer the question?

(Testimony of William K. Wells.)

A. Yes, sir, I said.

Q. What is your answer?

A. In regards to not getting the search warrant prior to that?

Q. Yes, prior to that date.

A. I was making observations on the premises of Mr. Cavness, and when I was ready I had the informer make a purchase on a certain date so I can get a search warrant for Mr. Cavness on the premises.

Q. And were you present when such a purchase was made? A. No, sir.

Q. Did you accompany her to the place? [49]

A. No, sir.

Q. Did you give her the amount of money or any kind of money for her to make such a kind of purchase? A. No, sir.

Q. Do you recall when it was that such a purchase as she stated in the search warrant was made to you? A. On July 10, 1949.

Q. And when did she inform you of that fact?

A. That same night.

Q. Do you know what she purchased, do you recall? A. A capsule of cocaine.

Q. How many? A. One.

Q. How much did she pay for it?

A. Ten dollars. That's a standard price.

Q. And when, how soon after she made such a purchase did you talk to her?

A. That night about—no, it was the following night I talked to her.

(Testimony of William K. Wells.)

Q. You didn't talk to her the day she made the purchase?

A. No, sir, Mr. Kinney talked to her.

Q. Sergeant Kinney? A. Yes, sir.

Q. You were there when Sergeant Kinney talked to her? A. No, sir. [50]

Q. Just you think that's what happened?

A. Just telling you what Mr. Kinney told me.

Q. When did Mr. Kinney tell you that he had talked to her—the same night?

A. When I got to the vice squad office that night about nine o'clock.

Q. That was July 10th? A. Yes, sir.

Q. And when did you prepare this search warrant?

A. I prepared that search warrant on the morning of the 12th.

Q. Why did you wait two days after the purchase? Weren't you very anxious to get hold of Cavness somehow?

A. I was busy on something else.

Q. Wasn't it important to get your search done as soon as the evidence is in?

A. No, sir. I got ten days.

Q. Well, you wasted two days. What if Cavness had flown away from the coop?

Mr. Hoddick: I object.

Mr. Miho: I will withdraw the question.

Q. Anyway, you waited until Tuesday?

A. Yes, sir.

(Testimony of William K. Wells.)

Q. And you didn't prepare this until Tuesday?

A. That's right. [51]

Q. And Gerry Wilson didn't read the search warrant until she came to your office just before Judge Steiner came into your office, or did she read it before?

A. Monday she came down to the office, Monday, and she gave me a little brief of what happened. I took it down in longhand. And then, when the informer came in about a little after 12:30 I had the informer read it, read the affidavit that she was going to sign, and she said that was correct.

Q. Where is that affidavit now, Mr. Wells?

A. It is in there (indicating file).

Q. This affidavit was signed on July 12th, wasn't it?

A. Yes, sir.

Q. Well, July 12th was a Tuesday, was it not?

A. That's when it was signed, yes.

Q. Well, didn't you say that she signed it on Monday?

A. No, sir, I had it down there on Monday and I took it down in longhand.

Q. And you prepared an affidavit?

A. Yes, sir.

Q. And she came in Tuesday to sign it just before Judge Steiner?

A. No, sir, she didn't sign it. She came in and read it.

Q. Read it Tuesday? [52]

A. Yes, sir, prior to Judge Steiner coming in,

(Testimony of William K. Wells.)

and then she signed the affidavit in the presence of Judge Steiner, when the Judge got through questioning her.

Q. There are no notes taken of interviews of that kind when Judge Steiner talks to anyone?

A. No, sir.

Q. Just an affidavit that you have here is filed in the record?

A. Yes, sir.

Q. And in addition to that, the Judge talks, too?

A. Questions her.

Q. He acts as a U. S. Commissioner, is that right?

A. Yes, sir.

Q. So that Gerry Wilson, so far as you know, talked to Judge Steiner only once?

A. Only once.

Q. That was for about 20 minutes to half hour?

A. I would say so.

Q. And was that 20 minutes to a half hour spent by the U. S. Commissioner Steiner and Gerry Wilson just for the purpose of this search warrant?

A. For your information, I had two other search warrants to be signed on that day, and the U. S. Commissioner was pretty busy for half an hour there reading and questioning her, the informer, with regard to the different affidavits [53] that she made.

Q. Didn't you tell me a few minutes ago that Judge Steiner talked to Gerry Wilson for 20 minutes to a half hour? Isn't that what you told me?

A. To the Commissioner, yes, sir.

(Testimony of William K. Wells.)

Q. Talked to Gerry Wilson for 20 minutes to a half hour?

A. Yes, sir.

Q. So that if he talked to you or anyone else about other search warrants, he was there for a longer time?

A. He talked to her in regards to the other two search warrants. She gave me an affidavit on it.

Q. For 20 minutes to a half hour?

A. Yes.

Q. Are you sure it was that long?

A. About that, yes, sir. After the informer left, the U. S. Commissioner sat there for about three, four minutes to talk about different subjects.

Q. So far as you know from your seven or eight conversations with Gerry Wilson, she had gone and made a visit, only one visit, to Cavness' home, is that right, so far as you know?

A. For the purchase of evidence for my office.

Q. Only one visit?

A. For me, yes, sir. [54]

Q. One capsule?

A. One capsule. But the informer——

Q. Now, Mr. Wells, you are in no position to produce Gerry Wilson at any time now, or are you familiar with where she may be today? You don't have to look at Mr. Hoddick.

Mr. Hoddick: I object to the question. Even if he were in a position to produce Gerry Wilson, there is no reason for producing her. He cannot be compelled to produce Gerry Wilson. Her evi-

(Testimony of William K. Wells.)

dence has no bearing on this case, the case in chief.

Mr. Miho: Well, I will withdraw the question and ask a different question, your Honor.

Q. Do you know where she is now?

A. No, sir.

Mr. Hoddick: I object to any question dealing with the present location of Gerry Wilson or whether the witness could produce her or whether she would come of her own accord or anything similar thereto.

The Court: There is no question before me at the moment.

Mr. Miho: If your Honor please——

The Court: There is no question pending before me at the moment.

Mr. Miho: Yes.

Q. Did you ever accompany Gerry Wilson down to the premises described in her affidavit to you by Gerry Wilson? [55]

A. No, sir.

Q. But you were interested in using her to get some evidence sufficient for a search warrant, is that right?

A. Yes, sir.

Q. Was she ever arrested or bothered in any way for having made such a purchase?

A. She was acting under my instructions.

Q. You promised immunity to her, then?

A. No, sir.

Q. But it is a fact that she made a purchase, you say, according to her affidavit?

A. Yes, sir.

Q. And from Orestus Cavness?

(Testimony of William K. Wells.)

A. Yes, sir.

Q. At this Houston Street address, is that right? Leahi Avenue, I'm sorry, 3811 Leahi Avenue.

A. Yes, sir.

Q. Are you sure there was no mistake in identity so far as this Defendant is concerned and so far as Gerry Wilson is concerned?

Mr. Hoddick: That calls for a conclusion on the part of the witness also.

Mr. Miho: I will reframe the question, your Honor.

Q. You never showed Gerry Wilson any photographs of Orestus Cavness, did you? [56]

A. No, sir.

Q. You never had any photographs of the Defendant Cavness, did you? A. No, sir.

Q. You never took Gerry Wilson down to Cavness' home, did you? A. No, sir.

Mr. Hoddick: May it please the Court—the question has been answered. Go ahead.

Q. (By Mr. Miho): You don't know how long, you didn't know how long she had lived in the Territory, is that right?

Mr. Hoddick: I object to this question and any other questions, Mr. Miho, that you may ask concerning Gerry Wilson. The only question involved in this case concerns eight capsules, according to the indictment, which in our opening statement was stated were found in the possession of the Defendant, Orestus Cavness. What purchases Gerry Wil-

(Testimony of William K. Wells.)

son may have made before, how many times she may have seen Mr. Cavness, or how many times she may have seen Mr. Wells, is entirely immaterial.

The Court: It seems to bear on the search warrant proposition.

Mr. Miho: Yes, I could take it up further at the time of the motion. I will proceed a little further on that angle, [57] your Honor.

Q. May I ask you this, Mr. Wells: So far as you are concerned, you believe thoroughly what this informer told you about Cavness?

A. Yes, sir.

Q. Now, is an informer paid for her services?

Mr. Hoddick: Objection. That is immaterial as to whether she is paid or not. It is also a matter which almost falls within the scope of privilege.

The Court: Well, regardless of that, we are not trying this case on the basis of any purchase made by this informer.

Mr. Miho: I will withdraw the question, your Honor. On the strength of this search warrant, so far as I know anyway, your Honor——

Mr. Hoddick: You are correct, your Honor.

Q. (By Mr. Miho): On the strength of this search warrant, you went with how many officers of the vice squad?

A. Captain H. Whitford, Sergeant A. Sousa, Richard Sasaki and Paul Shaffer, and Reserve Police Officer Abbey, and about a little before six

(Testimony of William K. Wells.)

we were joined by Officers F. Ferry, R. Marcotte and Harry Pestano.

Q. How many is that, Mr. Wells?

A. About eight, about nine of us.

Q. Had Mr. Cavness, the Defendant, been in any kind [58] of a pilikia so far as you know that may have made you think that he might cause a lot of trouble and cause a riot and have a lot of pilikia up there if you went by yourself with one or two witnesses?

A. The others accompanied us to search the premises outside. And it was getting a little dark and we wanted to search the premises before darkness occurred.

Q. Well, you had the search warrant, did you not? A. Yes, sir.

Q. The search warrant authorized only you to search, did it not?

A. I asked the vice squad to come out to assist me.

Q. Did you deputize them as your assistants?

A. I didn't deputize them. I can't deputize them. I can call on them for assistance.

Q. But nothing is done so far as any authority granted by the search warrant is concerned without your immediate presence and supervising, is that right? A. Yes, sir.

Q. That search warrant authorizes only you to search, is that correct? A. That's right.

Q. And the building of the Defendant, is that right?

(Testimony of William K. Wells.)

Mr. Hoddick: I think the search warrant will speak for itself, your Honor. [59]

The Court: It does.

Mr. Miho: I will withdraw the question.

Q. What other motive did you have in bringing eight or nine officers together with you to make this search of the house? May I ask you this question before you answer: How large is the Defendant's premises, first the house?

A. You mean the yard?

Q. The house first.

A. The house—it has a living room, a bedroom and a kitchen, and I think you can call that a rear bedroom, too. They use it for a dining room.

Q. You remember this phrase, "One-story wooden frame building"? A. Yes.

Q. Just an ordinary plain, single-wall dwelling, isn't that true?

A. I don't recall if it is single wall or double wall.

Q. Well, it is a plain house, isn't that correct?

A. Pretty good-looking house.

Q. And how many square feet of yard, approximately?

A. I would say it is 50 by 60 or 65.

Q. Anything very complicated in the yard? Is the yard full of grass or is it a dirt yard?

A. It has grass.

Q. Nearly all of it is grass? [60]

A. Grass and shrubs.

Q. Just a few shrubs, isn't that right?

(Testimony of William K. Wells.)

A. Yes, sir.

Q. Nothing very complicated or thickly vegetated in the yard? A. No, sir.

Q. Small, very plain yard? A. Yes, sir.

Q. And when you came up to the premises you stationed the seven or eight officers in a house across Leahi Avenue?

A. No, sir. Whitford, Sousa, Sasaki, Shaffer and Abbey followed me out to the house. The others were at the Waikiki Fire Station.

Q. Followed you out of what house, the house across Leahi Avenue?

A. Yes, Mr. Abbey's house, which is directly across from Mr. Cavness' house.

Q. How long had you been at this house?

A. Since 2:40, about 2:40 p.m. on July 19th.

Q. And the other officers were waiting at the fire station about the same time?

A. About the same time.

Q. And you had prearranged methods of communication whereby they would follow your instructions?

A. We were to telephone after we served the warrant [61] on Mr. Cavness.

Q. You had the warrant in your possession?

A. Yes, sir.

Q. Now, when you went to this house across Leahi Avenue at 2:45 or thereabouts, with these four officers, did you or did you not know that Orestus Cavness, the Defendant, was in his home?

A. We saw his car there.

(Testimony of William K. Wells.)

Q. Did you see him in his home?

A. No, sir, I didn't see him until about five minutes to four, that is, 3:55 p.m., when he came out with a colored girl, and he walked to the mail box, looked in the mail box, and finding in the mail box—he closed it and went back into the yard. He talked to the girl. Then the girl left and walked towards, on Leahi toward the Koko Head side. He got into his car, a Hudson sedan, 85931, and backed out and proceeded Ewa on Leahi Avenue.

Q. Now, how far is this house across the street from Leahi Avenue where you were observing him? How far from where you are sitting?

A. From house to house?

Q. From (indicating)?

A. About a little further than that. I would say another 25 feet.

Q. About a hundred feet altogether? [62]

A. About, approximately, yes, sir (referring to the courtroom).

Q. Will you explain to us why it was that you had the search warrant, accompanied by four or five officers, and you went there at 2:45 and still did not serve the warrant on the Defendant immediately but waited and waited and waited for hours?

A. We just placed observations on his premises to see who was going there.

Q. You wanted to catch some more people?

A. No, sir, we were just watching his premises.

(Testimony of William K. Wells.)

Q. How many times, how long had you kept his house under observation? On how many occasions before that time?

A. Oh, I would say about half a dozen times.

Q. Since about October of last year?

A. Since, I would say, since the latter part of June of this year.

Q. How many would make such an observation besides yourself?

A. I was accompanied by Sergeant Sousa, Reserve Officer Mr. Abbey. He was with us on several occasions. Mr. Harry Pestano. And on several occasions I have done it by myself.

Q. You made a list of people who went in and all that, took notes of what went on on each occasion? [63]

Mr. Hoddick: I haven't entered any objection before, your Honor, but it seems to me that we are dealing with a particular time and a particular offense; and what the past history of observation was, watching and listing of people going in and out, is not material to this case.

Mr. Miho: If your Honor please, I think it is a material development which will be helpful to all concerned as to the background of this particular case and this particular defendant and his relationship to this, the entire duties there.

The Court: You may proceed.

Q. You made notes and it was your job and you were out there to get something on Mr. Cavness. You told us that, is that right?

(Testimony of William K. Wells.)

A. Yes. Well, on several occasions I couldn't be too close to his house. On several occasions we were in the back of his place, and he's got a dog there and we had to get out. We couldn't make a close observation of his premises.

Q. Because of the dog?

A. Dog and neighbors.

Q. It is because you didn't want to give your hand away, that is the only reason why, isn't that right?

A. I didn't want him to know that we were watching his premises.

Q. Not because of any particular dog? You have been taking care of houses where there have been many dogs watching [64] the premises, is that right?

A. Not his dog.

Q. But there have been other dogs? You are not afraid of dogs?

A. Oh, yes, I am afraid of dogs.

Q. So it was a dog that stopped you from close observation?

A. On two occasions, yes, sir, in the back.

Q. And then the last time you made an observation of Cavness' premises was when it was with relation to July 12, 1949; it was when with relation to July 12, 1949?

A. September 19, you said?

Q. July 19, 1949.

The Court: Wait a minute. You are both all mixed up. Stick to the one date. You started talking about July 12th.

(Testimony of William K. Wells.)

Mr. Miho: July 12th, your Honor. I'm sorry. Correct the record.

Q. July 12, 1949, the date you made this arrest? A. You mean after or before?

The Court: That wasn't the date the arrest was made. July 19th was the date.

Mr. Miho: Sorry. July 19, 1949.

A. I think the last time I made the observation of his premises was on a Sunday night, if I remember, a couple of nights before we made the arrest, or Monday night, no, [65] I am quite sure it was Sunday night.

Q. About how many arrests would you roughly estimate that you have made in your almost eleven years? A. Twenty-eight years.

Q. Is it 28 years as a narcotic agent?

A. Yes.

Q. Since 19——

A. 1921, November 21, 1921.

Q. About how many would you think you have made? A. I can't recall.

Q. It's been perhaps over a hundred?

A. More than that.

Q. Much more than that? A. Yes, sir.

Q. Would it be closer to a thousand?

A. It could be.

Q. Have you ever served a search warrant in all your 28 years of experience as a law enforcement narcotics agent accompanied by seven or eight men or officers?

(Testimony of William K. Wells.)

A. On numerous occasions.

Q. I mean serving a search warrant on one person?
A. Yes, sir, I am quite sure.

Q. Do you recall? Tell me about it.

A. At the time I didn't know that Mr. Cavness was all alone in the house when he came back. [66]

Q. You knew that Cavness lived alone in the house, did you not, from your observations, six or seven observations prior to the time of the arrest?

A. Well, not from, well, from information.

Q. From your observations?

A. From my observation, yes, I have seen a lot of men and women go to his place and stay in there for quite some time.

Q. Like they do in your home and mine? Is it any more different than that?

A. Yes, but they don't stay in my home until two or three o'clock in the morning night after night.

Q. So as far as your information is concerned, he lived there alone?
A. Yes, sir.

Q. When was this other time that you were accompanied by seven or eight men when you served a search warrant on a defendant?

A. Where?

Q. When was that? Whom was it on?

A. On July 16, 1949, on Winston Churchill Henry.

Q. And you were accompanied by how many men there?

(Testimony of William K. Wells.)

A. Oh, about the same amount of men. Same.

Q. And from the same court?

A. Yes, sir [67]

Q. And before then?

A. Before then? One time I think I was accompanied by at least 15 men, when we first raided the premises of Winston Churchill Henry.

Q. A barricaded place? A. Yes, sir.

Q. But outside of Henry, the celebrated Winston Churchill Henry, and Cavness here, when was it that you had as many as eight men accompanying you?

A. Well, years back we raided different opium dens around here and we were accompanied by Alcohol Tax Unit inspectors and police officers.

Q. But, Mr. Wells, isn't it about the only time, this occasion, about the only time when you have made an arrest, when you served a search warrant on a single individual living by himself in a home where you were accompanied by seven or eight officers, isn't that about the first time you have ever done that?

A. I don't think so. I don't recall when I have served search warrants accompanied by many police officers.

Q. But this is certainly one of your most rare occasions, isn't it?

A. No, sir, I wouldn't say rare occasions.

Q. Well, give us some others where you served a search warrant accompanied by seven or eight officers on a [68] single person living in a house

(Testimony of William K. Wells.)

by himself in your 28 years of experience? Give me one occasion? A. I don't recall.

Q. So that so far as you know, there has never been up to this point, there has never been a time like this, is that right? A. It could be.

Q. Now, when you went up to Mr. Cavness' place you didn't serve it because you said you were waiting to observe further, even after you saw him come out and look around the yard and look in the post office box and say goodbye to his friend, you still kept it in your house, is that right?

A. That's right.

Q. And you waited for about two more hours or three more hours? A. That's right.

Q. And during all that time you kept it under observation, you and your brother officers?

A. Yes, sir.

Q. Now, what made you come out from the house? A. Beg pardon?

Q. What made you come out of the house where you were watching?

A. I received information that when we raided the premises of Winston Churchill Henry on July 16, 1949—— [69]

Mr. Miho: I object to any self-serving declarations or any hearsay evidence coming at this point except as it relates to an answer to my particular question. What he may have heard as a result of other raids is certainly unresponsive question or answer.

(Testimony of William K. Wells.)

The Court: You asked him why at his point of observation he had a search warrant—he may answer the question. He may answer your question directly.

Mr. Miho: No, I asked him——

The Court: Why he left the house where he was watching to go across the street to serve the search warrant?

Mr. Miho: That's right, your Honor, and then he started to say that when he raided Winston Churchill Henry's place he heard——

The Court: That may go out and he may answer your question directly.

Mr. Miho: Thank you.

The Court: Meaning without any background to answer.

Mr. Hoddick: The background may constitute his reasons.

The Court: I don't know. Let him answer it directly without going around.

Q. (By Mr. Miho): You understand the question, Mr. Wells? A. Yes, sir.

Q. Will you answer it, please? [70]

A. That Mr. Cavness didn't keep his plant there. By "plant" I mean his cocaine there and——

Mr. Miho: If your Honor please—just a moment, Mr. Wells—I move that that be stricken from the record and the Jury be instructed to disregard it, your Honor, please, as wholly conclusive, highly prejudicial to the Defendant, and he knows that. It is unresponsive.

(Testimony of William K. Wells.)

Mr. Hoddick: You asked a question "why," Mr. Miho. Mr. Wells is endeavoring to answer your question.

Mr. Miho: No relation to the question.

Mr. Hoddick: Mr. Wells is not testifying as to the truth of what he is stating, as to whether Mr. Cavness kept his plant there or not. He is merely stating that that is what he heard, why he did it. That doesn't constitute hearsay.

The Court: Well, the question is, to repeat, why, Mr. Wells, did you leave your point of observation to go across the street and serve your search warrant upon the Defendant? That is the question. Now, Mr. Miho wants to know what your reason was for doing that. Now you may give him your reason.

Mr. Miho: I may reframe that to help him. He may not understand my question.

The Court: Wait a minute. I want you to answer that question again. Your former partial answer is stricken and the Jury is instructed to disregard it. Make sure everybody [71] understands what the question is and what you are asked to answer. And talk plain English so we can understand what you are saying.

The Witness: Well, your Honor, I want to answer the question but I don't want to take advantage of Mr. Miho. And it is a——

The Court: He doesn't want you to either.

The Witness: No, sir. That is why it is a very difficult question to answer.

(Testimony of William K. Wells.)

Mr. Miho: I believe, your Honor, please, I understand his difficulty, and if I may be permitted perhaps I can get around it by not putting him in an embarrassing position to be able to take advantage of me, your Honor.

The Court: All right. You want to withdraw the question and reframe it?

Mr. Miho: Yes, I will withdraw it.

Q. Now, Mr. Wells, you were waiting to see if Cavness would sell something or hand something, some offer to someone, or receive something from some one, isn't that it, wasn't that your motive to watch the house? A. No, sir.

Q. You stated you were there for observation to get more evidence?

A. My reason was for him to leave the place.

Q. Then how could you serve a search warrant?

A. And when he came back, to serve the search warrant on him, because I have received prior information as to some of his activities.

Q. Mr. Wells, in fact your idea as you operate, as I understand you operate, is that you thought that if you waited long enough Cavness or someone in his position would go out, come back, put some evidence in his home; he wouldn't have time to hide it, or something, and then you'd go in and jump him and grab him, is that right? Wasn't that your motive for waiting patiently?

A. No, sir. My motive was to wait for him to leave the house and when he came back to serve the warrant on him.

(Testimony of William K. Wells.)

Q. And what would that accomplish?

A. Through certain information I have received.

Q. I see. So you wanted him to leave the house?

A. Yes, sir.

Q. You were waiting for him to leave the house?

A. Yes, sir.

Q. Without you knowing about it? And then you were going to wait for him until he came back and then serve the search warrant?

A. Yes, sir.

Q. For some particular reason, is that right?

A. Yes, sir.

Q. Then he came back a little later? [73]

A. Yes, sir.

Q. There was nothing to indicate anything unusual in his appearance or the manner of his driving or the manner of his dress or anything of that kind to make you feel in any way as to your bodily harm or insults, is that right? A. No, sir.

Mr. Hoddick: I don't understand that question.

Mr. Miho: Well, the witness understood it.

The Court: He answered yes, sir.

Mr. Miho: I was just talking to Mr. Hoddick. I'm sorry.

Q. Now, when Mr. Cavness came in like that, you got your search warrant out or did you have it in your pocket?

A. I had the search warrant in my right hand and my badge in the left hand.

(Testimony of William K. Wells.)

Q. And didn't you say you grabbed him with one hand? A. No, sir.

Q. Didn't you so state before the U. S. Commissioner that you grabbed his left hand because he shoved you?

A. He shoved me first. No, sir. He shoved me first.

Q. So you shoved him? You grabbed him, didn't you say that?

A. When he shoved me, then I grabbed his left hand.

Q. And you had something in both your hands but you still were able to grab his one arm? [74]

A. I grabbed his left arm.

Q. And what did you have in your left hand?

A. My badge.

Q. So you dropped your badge?

A. No, sir, I held on to my badge.

Q. What did you have in your right hand?

A. The search warrant.

Q. You didn't have a chance to read the search warrant to him when he came in, according to your story? A. No, sir.

Q. You had to wait until you got inside the house before you could read the search warrant to him? A. That's right, sir.

Q. And that was the first time you served the search warrant on Cavness, that was in the house, is that right? A. Yes, sir.

Q. Now, he was bleeding profusely from the back of his head, was he not?

(Testimony of William K. Wells.)

A. He was bleeding, yes, sir.

Q. Do you remember who was it that used a blackjack on him?

A. I didn't see anybody use a blackjack on him, Mr. Cavness.

Q. You didn't see?

A. No, sir. The only time I saw anybody use a blackjack [75] was when I told Mr. Abbey to get his hand open, and he hit his blackjack on his head and his hand opened, his left hand, because he had it clutched like that (indicating). We couldn't open it.

Q. So you saw Abbey hit his hand with his blackjack?

A. Yes, sir.

Q. And you told him to do that?

A. I told him if he could see if he could open his hand, so he konked his left hand.

Q. Who else had a blackjack among the eight?

A. I think that is the only one I saw.

Q. Are you sure?

A. Yes, sir.

Q. You know whether Abbey used a blackjack on the back of Cavness' head or not?

A. No, sir.

Q. You told us that Cavness fell back twice, did you not? He fell down twice?

A. Twice. And the last time, I would say, the third time, when we got him down on his stomach.

Q. Did he fall down or was he knocked down with a blackjack and a couple of blows?

A. You mean the third time?

Q. At any time?

A. No, sir. [76]

(Testimony of William K. Wells.)

Q. He was bleeding from his mouth, too, was he not, profusely? A. I think that——

Q. Just answer the question. A. Yes, sir.

Q. Never mind the explanation.

Mr. Hoddick: I think the witness ought to be able to answer the question in as much detail as he sees fit.

Mr. Miho: Your Honor please, it is a very simple question. Wasn't he bleeding from his mouth?

The Court: It may be simple but there is no rule that requires that an answer be confined to yes or no. He may answer yes or no and then explain if he wishes to. Have you finished your answer?

The Witness: No, sir.

The Court: All right.

A. He was bleeding from his mouth, I think, from the time that he had the Vicks inhaler tube in his mouth, and he bit on it.

Q. Well, how would that cause a bleeding in his mouth?

A. Because it was cracked and a couple of the boys were trying to get it out of his mouth.

Q. In fact, they tore his left lip open on the side, isn't that right?

A. I don't know if it was the left or right. Either [77] one.

Q. Well, his lip was torn open, wasn't it?

A. Beg pardon?

Q. One of his lips was torn open, wasn't it?

A. Yes, sir.

(Testimony of William K. Wells.)

Q. You were right there? (To Defendant Cavness.) Stand up. Will you come up here. (To the Witness.) You recall which lip it was now that was torn open?

A. Maybe it is the left. I don't know. It is either the left or the right.

Q. I show you what looks like a scar here. (Indicating on Cavness.)

A. It could be the left, yes, sir.

Q. It was the left, wasn't it?

A. Yes, sir.

Q. It was torn open from here to here about a half inch, isn't that right?

A. I really don't know.

Q. You don't know?

The Court: Wait a minute. You are both talking for the record about the man's lower lip.

Mr. Miho: I'm sorry, your Honor. The lower lip.

Q. You know the skull in the back where I am pointing at, the top part, the rear of his skull, was split open by some blunt object? [78]

A. It was bleeding from up there.

Q. Don't you remember the scalp kind of peeling out and showing an opening there?

A. No, sir.

Q. You don't? A. No, sir.

Q. What kind of a shirt did he have on that day? A. Either dark brown or——

Q. I show you what purports to look like a

(Testimony of William K. Wells.)

woolen shirt. Do you remember seeing that? Take a good look at it.

A. This is the shirt that Mr. Cavness had on.

Q. Now, what are those splotches in the shirt there? A. Blood.

Mr. Hoddick: Objection, your Honor. I don't think the witness is qualified to testify as to blood spots there.

Mr. Miho: I will withdraw the question, your Honor, please.

Q. He had blood over his shirt in the front and the back, isn't that right? He was bleeding on this shirt, wasn't he, that day? A. Yes, sir.

The Court: What?

A. Yes, sir.

Q. And you say you didn't see his skull open in the [79] back?

A. Well, I saw what you call a cut up there.

Q. You saw a cut?

A. And he asked, he wanted a towel, and we gave him a towel.

Q. When did you give him a towel?

A. Inside.

Q. In the house? After you read the search warrant? A. Yes, sir.

Q. Didn't you take him, weren't you nice enough to take him to the emergency hospital afterwards?

A. A couple of the other boys took him.

Q. And you questioned him in the police station later on after he got through the emergency hospital? A. Yes, sir.

(Testimony of William K. Wells.)

Q. And you saw him at the police vice squad?

A. In the vice squad office, yes, sir.

Q. Now, how many stitches, I mean how many clamps did he have in the back of his head to put his skull together? A. I really don't know.

Q. Don't you watch whether they are hurt sufficiently to be questioned or not?

A. I asked him if he is all right and he said yes.

Q. Didn't you notice whether he had clamps on the back of his head or not? [80] A. No, sir.

Q. You didn't? A. No, sir.

Q. Would you deny that he had clamps on the back of his head?

A. He could have had clamps there. I was busy with the other officers and evidence and trying to question him.

Q. But you were there and you saw him, didn't you, in the vice squad?

A. When he came back, yes, sir.

Q. And you still say you don't know whether he had any clamps on the back of his head or not?

A. I don't recall seeing any clamps.

The Court: Wait until the question is finished.

Q. How long did you see him at the vice squad?

A. I think he was there for about three-quarters of an hour.

Q. How many officers at the time he got out of the car took a poke or jumped on Cavness? You give us the name of each one.

A. After Sergeant Alfred Sousa was in the back

(Testimony of William K. Wells.)

of me, then I was joined by Captain Hugh Whitford, Sergeant Richard Sasaki and Sergeant Richard Sasaki, Patrolman Paul Shaffer, and Reserve Officer Arthur Abbey.

Mr. Miho: Your Honor, please, may I be permitted to call [81] these officers here that he just named?

The Court: Yes. As I now understand the witness, based on that question, all of these men either took a poke at him or jumped at him.

The Witness: No, sir, I didn't testify to that.

The Court: That was the question. He asked you to name them.

The Witness: No, sir, I didn't. I misunderstood his question, your Honor.

Mr. Miho: May I have that particular question and answer reread?

(The reporter read the last question and answer.)

Q. Those officers you just named, are these the officers here, is that right (indicating some men who had entered the courtroom)?

A. I misunderstood your question, Mr. Miho.

Q. Will you just answer my question, Mr. Wells?

A. They are the officers that accompanied me on the raid.

Mr. Miho (To the men mentioned previously): That's all. Thank you.

Mr. Hoddick: Now, your Honor, I think the De-

(Testimony of William K. Wells.)

defendant should be given an opportunity to straighten out whatever error he thinks might have been introduced in the record. In other words, a fuller explanation and answer. [82]

The Court: He had had 28 years' experience. He can take care of himself.

Q. (By Mr. Miho): Mr. Wells, you heard the question and answer reread by the reporter?

A. Yes, sir.

Q. Now, you wish to change you story?

A. I don't wish to change my story. But I misunderstood the question, Mr. Miho.

Q. How long have you been an officer in this kind of work? A. About 28 years.

Q. How many times do you think you have testified in court? A. On numerous occasions.

Q. Numerous or innumerable occasions?

A. Yes, sir.

Q. Innumerable? A. Yes.

Q. And you say that you misunderstood my question? A. Yes, sir.

Q. Then I will give you an opportunity to change it, if after 28 years you misunderstood my question; I will give you an opportunity to change it in any way you want. Now, see if you can change it.

A. I at no time saw Mr. Whitford, Sousa, Paul Shaffer, Abbey, strike the Defendant Cavness.

Q. Who and who did you see strike Cavness?

A. I didn't see anyone strike Cavness.

Q. So far as you know, you were just an innocent bystander, is that right? A. No, sir.

(Testimony of William K. Wells.)

Q. You were the first to see Cavness, is that right? A. Yes, sir.

Q. You were the first officer or first person to talk to Cavness, is that right? A. Yes, sir.

Q. And you stated a while ago, if I understood you correctly, that some officer—and I won't name him—some officer joined you from the back, didn't you? A. Yes, sir.

Q. Who was that officer that joined you?

A. Sergeant Sousa.

Q. And for what purpose did he join you, for what purpose?

A. To assist me, to subdue Mr. Cavness.

Q. To subdue Mr. Cavness? A. Yes, sir.

Q. And what did he do in order to assist you to subdue Mr. Cavness? [84]

A. When Mr. Cavness shoved me, Mr. Sousa came to my assistance.

Q. I see. Mr. Cavness was still in the car, was he not?

A. By that time he was out of the car. He was in the car when he shoved me.

Q. That's what I thought you said originally, that he shoved you while he was still in the car.

A. Yes, sir.

Q. That his left foot was on the running board. Did you say running board?

A. It was hanging out.

Q. Hanging out? And his left hand was on the left door? A. Yes, sir.

(Testimony of William K. Wells.)

Q. Just as you approached him and showed him your badge? And then with his left hand he shoved you? A. That's right.

Q. Now, where did he shove you?

A. Like this (indicating).

Q. Before anything was said or done he shoved you, is that right?

A. No, after I had told him—I identified myself and told him that I had a search warrant to search his premises. That's when he shoved me.

Q. It wasn't that the door by any chance touched you, Mr. Wells? A. No, sir.

Q. That would be fantastic?

A. That's right.

Q. I see. Do you remember anyone calling the Defendant words something like, "You dam black son of a bitch," or, "You damn negro," or something like that? A. No, sir.

Q. You deny that you might have heard something like that said by somebody within that group?

A. I deny.

Q. You heard everything? A. No, sir.

Q. What did you say or do when, as you claim, you were shoved by the Defendant?

A. I grabbed his left hand.

Q. What was the reason for grabbing his left hand even if he shoved you?

A. While talking to Mr. Cavness I saw he had a Vicks inhaler tube in his right hand.

Q. So you got suspicious, isn't that right?

(Testimony of William K. Wells.)

A. Yes, from information that I received.

Q. You get a lot of information? So you got information and from that information you got suspicious of that [86] Vicks inhaler tube?

A. That's right.

Q. You used Vicks inhalers in your lifetime, haven't you? A. Yes, sir.

Q. You know that is one of the most common forms of medicinal preparations in use by the ordinary people, do you not? A. Yes, sir.

Q. But when Cavness had it you got suspicious, didn't you? A. Yes, sir.

Q. So you thought you should by force grab that inhaler, didn't you? Didn't you?

A. That's right.

Q. And for that purpose you asked your fellow officers to help you to subdue him, as you say?

A. I didn't ask. They came to my assistance.

Q. Without your telling them anything they just came to your assistance?

A. I casually said, "I think he's got it in his right hand."

Q. "I think he's got it in his right hand." And then Officer Shaffer was the first, Sousa was the first one to come to your rescue? [87]

A. That's right.

Q. And as soon as Officer Sousa came to the scene, you stepped out completely, is that right?

A. No. By that time Mr. Cavness, Sousa and I were a little away from the left front door. And Mr. Cavness started to break away from us to-

(Testimony of William K. Wells.)

wards, in front of the garage there. Then we were joined by Mr. Whitford and Mr. Shaffer and Mr. Abbey and Mr. Sasaki.

Q. And when Cavness came out, he wanted to run away from you, and these seven or eight officers, isn't that right?

A. He tried to get away from Sousa and I.

Q. And Sousa was doing what to Cavness as he came out of the car?

A. He was holding his right arm.

Q. Holding Cavness' right arm? And what were you doing?

A. At the time, what you call, between then, I stuck my badge in my left, in my front pocket, and my search warrant and—no—yes, then I had a hold of his left arm again and he started to get away from us, and when he came out of the car he fell down and got up and as he tried to get away from us, running towards the, I would say, the front of the car, he fell down again and that's when he got up on his knee; that's when we were joined by the other officers and the struggle took place then. [88]

Q. He was not, by anyone, yourself or any of the officers, placed under arrest at any time, is that right? Answer the question yes or no.

A. Yes, sir.

Q. When?

A. After I served the search warrant on him and the capsules were found out in the yard.

(Testimony of William K. Wells.)

Q. So that during this physical struggle that you had with Cavness, before any officer touched him, he was never placed under arrest, is that right? A. No, sir.

Q. The only reason you and your brother officers manhandled, if I may use the word, Cavness was simply because he had a Vicks inhaler in one hand and because he tried to get away from you seven or eight or nine officers, is that right?

A. We didn't try to manhandle Mr. Cavness. We tried to subdue him.

Q. Well, subdue, then. He was bleeding from his mouth, his lips, lower lip was cut open; his scalp in the back was bleeding, and he was bleeding profusely on his shirt, this shirt here, the front, as well as the back; it was bleeding profusely, and by profusely——

A. He was bleeding but I wouldn't say profusely.

Q. He was bleeding quite a bit, wasn't he? [89]

A. Quite a bit, yes, sir.

Mr. Miho: Do you have any objection to this being introduced as Defendant's exhibit, Mr. Hoddick?

Mr. Hoddick: I would at this time.

Mr. Miho: May that be marked for identification, your Honor?

The Court: Yes.

The Clerk: Defendant's 1 for identification.

(The clothing article referred to was marked
"Defendant's Exhibit 1 for Identification.")

(Testimony of William K. Wells.)

Q. (By Mr. Miho): Do you know after Shaffer grabbed hold of Cavness who else came to the——

A. Shaffer—there was Sasaki, Abbey——

Q. Just a moment. I am trying to get this step by step. If the two officers came at the same time, tell us that. But give us the complete details. Now, after Shaffer jumped on—maybe he didn't jump on him, but after Shaffer tangled with Cavness Sasaki came and entered the picture, is that right?

A. I don't recall.

Q. Well, you and Shaffer——

A. Sousa and I first.

Q. Sousa? I'm sorry. Sousa and you?

A. That's right. [90]

Q. Sousa and you?

A. That's right. And then Captain Whitford. When the three of us were struggling with him, then the rest of them——

Q. What did Whitford do?

A. Whitford grabbed Mr. Cavness' right hand at one time.

Q. Did you say that Sousa had already grabbed his right hand?

A. By the shoulder. When we got in the front of the car that's when Whitford came along.

Q. Where did Whitford grab Cavness?

A. One time during the struggle I saw Whitford had a hold of his right hand.

Q. Right hand?

A. Yes.

(Testimony of William K. Wells.)

Q. At one time? A. At one time.

Q. At another time what did you see?

A. I don't remember.

Q. Now, Abbey came along about that time or Sasaki? Which one was it first?

A. I don't recall.

Q. You don't recall? A. No, sir. [91]

Q. But all the other officers joined in about that time, isn't that right? A. Yes, sir.

Q. And you remember who it was that hit Cavness on the head? A. No, sir.

Q. You still don't remember that?

A. No, sir. When Whitford got hold of his hand then I had Cavness around his, you'd say——

Q. Waist?

A. ——waist, waist there with my head down like that and wondering what took place. I couldn't see.

Q. That didn't last very long, did it?

A. Oh, yes, it lasted about three, three and one-half minutes.

Q. All right. How long did the entire struggle last?

A. I would say between three and four minutes.

Q. Is that all? A. Yes, sir.

Q. I see. Now, you said Cavness came out of the door of his car, fell on his knees?

A. Partly fell on his knees, partially.

Q. Partially? A. Yes, sir.

Q. Did he hit the ground on his knees? [92]

(Testimony of William K. Wells.)

A. Yes, sir.

Q. And then what happened?

A. Then he got up and as he started to struggle away from us towards the front there he went down again.

Q. He went down on his, flat on his stomach, didn't he?

A. At that time, no, sir; on his knee.

Q. On his knee again? A. Yes, sir.

Q. And then he got up?

A. Got up and then the real struggle took place in front of the car on the lawn there.

Q. And he had another fall?

A. Then——

The Court: Another what?

Mr. Miho: Fall.

A. ——we got him down on his stomach.

Q. On his stomach? A. Yes, sir.

Q. That was the last fall? A. Yes, sir.

Q. And that was not a fall but you shoved him down on his stomach?

A. I think somebody grabbed his feet. He wanted to get him down so we can—— [93]

Q. Get the evidence?

A. That's right.

Q. Somebody grabbed and he fell on his stomach, and flopped down on his stomach, and at no time——altogether you have described three sorts of knock-downs, when he first came out of the car, when he started to go, and then he fell down, not shoved

(Testimony of William K. Wells.)

down but fell down, and then he came back by the car and that's when he was really shoved down on his stomach? A. That's right.

Q. So that at no time did he hit his head on the ground, did he, or any of——

A. I don't recall.

Q. Well, you were there, Mr. Wells?

A. Yes, but it happened so fast.

Q. You have been an officer for 28 years. Your job is to limit things, every detail, if you can, is that right? A. Supposed to.

Q. Still you don't remember? If he would hit anything, the side of his head, any object, a door, stone, another man's knee, anything like that, you don't remember? A. No, sir.

Q. So far as you are concerned his scalp split open and you don't know how that happened?

A. That's right.

Q. You just know that he was bleeding from the back [94] of his head and his scalp was open, that's all you know? A. Yes, sir.

Q. And he was bleeding from it?

A. That's right.

Q. And the lips being cut open?

A. That's right.

Q. You remember that, too? A. Yes, sir.

Q. But the exact details of how that happened or who did it, you don't know? A. No, sir.

Q. Now, he was in a semi-conscious state when he fell down the last time, was he not; groggy, wasn't he?

(Testimony of William K. Wells.)

A. I won't say that. As soon as we opened the left hand he said, "Why, take me in." We, when we got him up, that is the first thing he said, "Take me into the house."

Q. Calm and collected? A. Yes, sir.

Q. He was bleeding on the head, he was knocked down, coming to his knees twice, eight officers jumping on him, and still he was calm and collected?

A. He was.

Q. Now, Mr. Wells, you testified before the U. S. Commissioner on the hearing on this case when I was present questioning you, is that right? [95]

A. Yes, sir.

Q. Do you remember stating to the U. S. Commissioner at that time in answer to one of my questions that the Defendant Orestus Cavness did not at any time fight back, that he did not at any time fight anyone back? You remember making that?

A. What do you mean by fighting back?

Q. Hitting, shoving.

A. Well, he shoved me.

Q. Well, let's say outside of that first shoving of you. Is it correct, my recollection and my notes, that you stated before the U. S. Commissioner that outside of that shoving, let us say, that Cavness, this Defendant, did not hit back at anyone, at any one of the officers at any time?

A. That's right, sir.

Q. Now, after he was shoved down on his stomach, received these injuries,—how, we don't know—

(Testimony of William K. Wells.)

you say he was not semi-conscious or groggy at all?

A. No, sir.

Q. And he got up by himself?

A. We got him, I mean we got him up.

Q. You had to help him up, didn't you?

A. Well, I mean, yes, we kept, we kept still holding his left and right arms and we handcuffed him and took him inside, served the search warrant on him? [96]

Q. You handcuffed him? A. Yes, sir.

Q. Who handcuffed him?

A. I think Mr. Abbey.

Q. Then you—who held onto him as you went into his house?

A. I don't recall who.

Q. Well, you were one of them?

A. I went in. I think Mr. Whitford, Mr. Shaffer—

Q. Sousa? A. No, sir. Mr Sasaki.

Q. Didn't Abbey and all the rest of you go up to the house?

A. No, Mr. Abbey and Sousa stayed in the lawn.

Q. Didn't they proceed on towards the house together with the rest of you?

A. From Mr. Abbey's house?

Q. Yes. No, after the struggle was all over, didn't all of you try to go into Cavness' house up as far as the porch anyway, the door?

A. We went into his house except Mr. Sousa and Mr. Abbey. They stayed outside on the lawn.

(Testimony of William K. Wells.)

Q. On your instructions?

A. Beg pardon?

Q. On your instructions? [97]

A. No, sir.

Q. They just stayed behind

A. They just stayed behind, yes, sir.

Q. And the rest of you went into the house?

A. Yes, sir.

Q. You told Cavness to go clean himself up, didn't you?

A. When we went into the house?

Q. I didn't ask you when. Did you tell him to go and clean himself up? A. No, sir.

Q. He asked to clean himself up?

A. He asked me. I said, all right. And we took the cuffs off him.

Q. But that was not until after you read the search warrant to him, is that right?

A. That's right.

Q. So that at the time you gave him the search warrant, as a result of this struggle he was bleeding from his head and from his lips and you read him, you told him to sit down, didn't you?

A. Yes, sir.

Q. And then told him, I have a search warrant to search your house, didn't you?

A. It is the second time I told him. [98]

Q. And the second time you read the search warrant word for word, didn't you? Didn't you?

A. No, sir. I think Mr. Cavness—I asked Mr.

(Testimony of William K. Wells.)

Cavness if he wanted me to read the search warrant and he said no.

Q. So you never read the search warrant to him?

A. He didn't want me to read it to him.

Q. You read it?

A. No, he didn't want it read so I handed him the copy.

Q. And the reason he didn't want you to read it was because he was bleeding and he was sore—I will withdraw the question. He asked you to go clean himself up before you offered to read the search warrant, though, didn't he

A. No, sir, I think it was before that.

Q. Before you read the search warrant

A. Then he asked me if he can go clean himself up. At the same time he apologized for struggling with the officers.

Q. Oh, he apologized?

A. Yes, sir. He said he was sorry for what he did.

Q. Did you apologize to him for having somebody bust him, cutting him up? Nobody apologized?

A. I didn't bust him up.

Q. I'm sorry. Somebody having done so.

A. I didn't apologize to him.

Q. No one apologized? [99]

A. No, sir.

Q. To Cavness?

A. No. Beg pardon?

(Testimony of William K. Wells.)

Q. No one apologized to Cavness?

A. No.

Q. But he apologized to you?

A. Yes, sir.

Q. For struggling? A. Yes, sir.

Q. Didn't he tell you, "Why didn't you tell me what you wanted to see me about? Otherwise I wouldn't have tried to get away from you?"

A. No, sir, he didn't say that.

Q. He didn't say that? A. No, sir.

Q. Well, as you went into the door, he said, "Let me clean myself up," or words to that effect, is that right? That was one of the first things he said as you went into the house?

A. Yes, sir.

Q. And you told him, "Just a moment, let me read this warrant because I have got to serve the search warrant"?

A. I think he asked for a towel and he was given a towel at the time. And then I told him to sit down and asked him if he wanted me to read the search warrant, and he said [100] no. I gave him copies of the search warrant. Then he asked to go in the kitchen, I mean the bathroom, to clean up.

Q. He went to clean up? A. Yes, sir.

Q. He washed the blood off his face?

A. Yes, sir.

Q. And then while he was in the bathroom, what did you people do?

A. Prior to going into—as we took the hand-

(Testimony of William K. Wells.)

cuffs off Mr. Cavness, that is when Mr. Abbey called to me to come outside and I took Cavness outside and he pointed out a piece of the top of a Vicks inhaler tube with two capsules stuck to it. And I was present when Mr. Shaffer found six capsules right along where we were struggling. And then we went back into the house and he cleaned himself up.

Q. Well, where was Cavness when you went outside

A. I took him outside with me.

Q. Oh, you took him outside?

A. Yes, sir. And he was present when Mr. Abbey pointed to it.

Q. Capsules?

A. To the two capsules. And then he was present when Mr. Shaffer found the six capsules on the lawn there.

Q. Now, you go to the blackboard, will you, Mr. Wells, and put down where the car was, where the struggle took place, [101] and where the house was, and where you found these two capsules?

A. I will try to.

The Court: Can you all see on the blackboard?

Mr. Miho: Can you all see the blackboard? Just a moment, if your Honor please. May the officers who are going to be witnesses be ordered to keep away from the door? They can hear what is going on in this courtroom.

The Court: Well, the order of exclusion implies

(Testimony of William K. Wells.)

that they are to keep beyond the hearing of that which transpires in the courtroom. I, too, was noticing them in the hall there and observing them myself. It is too bad we don't have an appropriate place for witnesses to sit down in and wait. It occurs to me that the Grand Jury room or the ante room thereto should be supplied with sufficient chairs for witnesses to sit down there and stop roaming around the hallways. Actually there are only about five more minutes today. I doubt if we will get to them. I think they could actually be excused for the day.

Mr. Miho: Yes, your Honor please.

The Court: Henceforth tell the witnesses and people who are waiting to testify that I'd much prefer them to make themselves as comfortable as possible in the quarters to which I have just referred, and see to it that there are chairs and ash trays in there. [102]

Mr. Hoddick: Your Honor, I'd like to be able to indicate to the witnesses what time they should return.

The Court: We had that worked out this morning. What was it—Wednesday afternoon?

Mr. Miho: Two o'clock Tuesday afternoon.

Mr. Hoddick: No, Wednesday afternoon.

The Court: All right.

(Witness writes on blackboard.)

Q. (By Mr. Miho): Where is the garage, Mr. Wells?

(Testimony of William K. Wells.)

A. Here is the garage (indicating).

Q. Two-car or single garage?

The Court: Where is the garage?

A. Right here, your Honor. This is the car.

The Court: What sort of a garage is it, a covered-over affair?

A. No, sir, it is just on the top.

Q. No walls? Just trestles on the side?

A. Yes, sir.

Q. In other words, you can see right through the garage from all angles, is that right?

A. That's right.

Q. Sort of a lean-to? A. Yes, sir.

Q. And there is a little fence to the house there? Where is the entrance to it?

A. This is all open. This is all hedge, panic. This is a hedge here, over here, over here and over here. This is the car. First came out here. We got him out here. Then he fell on his knee and he fell on his knee again and then the real struggle took place, I would say, about here. See, there is——

Q. Will you mark it 1, 2 and 3 where the struggles took place?

A. One, two, three, about here.

Q. Now, how wide is the entrance to the premises, 20 feet, 15 feet?

A. You mean the garage entrance?

Q. No, the entrance to the premises.

A. You mean from here up here to the front porch?

(Testimony of William K. Wells.)

Q. The entrance to the yard.

A. To the yard? Oh, well, it is open from here to the garage.

Q. About how many feet?

A. I would say about from here to here to that wall.

Q. It would be about 15 feet?

A. Approximately.

Q. All right. Now, which is the front of the house, Mr. Wells? A. Here. [104]

Q. Where is the front door?

A. The front door is right here.

Q. And where is the living room?

A. This is the living room, bedroom and toilet.

Q. And where is the kitchen?

A. Here. And this is a rear room that he used for a dining room.

Q. Will you put "D. R."

A. Dining room "D. R." From here is a small——

Q. Hallway? A. Yes, sir.

Q. Now, where was the Defendant's car as he came in just prior to the fight with relation to the garage? A. Right in the garage there.

Q. The struggle started in the garage?

A. Yes, sir.

Q. There are no walls to the garage excepting supporting posts?

A. If I remember correctly, yes, sir.

Q. I see. So that he drove into the garage?

(Testimony of William K. Wells.)

Will you indicate what, will you indicate with an arrow the direction that this car came into the garage (witness writes on blackboard)? And give us the arrow of the direction you and your officers came in. Where is the house—across the yard? [105]

A. Here.

Q. Put an "A" on the house. I think that was Mr. Abbey's house.

A. "A." We came out of here.

Q. So that after he drove in, you people followed the car in? A. That's right.

Q. Now, put down any objects other than grass immediately around the garage, Mr. Wells, other than the garage posts and the hedge fence. If there are any objects on the ground, plants, stones, or any kind of obstructions of any kind right around the premises of that garage, between the garage and——

A. Right here is a coconut tree, one there and one about here.

Q. That's all?

A. That's all I can recall at the present.

Q. How many feet is it from the hedge to the side of that garage, approximately?

A. Approximately 10 feet.

Q. Would you indicate there 10 feet, put an arrow? A. From here?

Q. From the hedge to the side of the garage.

A. Is this the hedge you are talking about?

Q. The left hedge as you go into the house. Put

(Testimony of William K. Wells.)

another [106] arrow on the other side so that we will know what it is.

Q. Now, this 10 feet will be from this hedge to the side of the garage, approximately?

A. Approximately 10 feet.

Q. Approximately? A. Yes, sir.

Q. And this distance from here to here is how many feet? A. I would say——

Q. A hundred feet?

A. ——anywhere from 65 to 75.

Q. And from here to the side of this house. how many feet?

A. I think about 10, 15, I would say.

Q. From here to here?

A. Well, approximately.

Q. Well, how much longer is it than the distance from the hedge to the side of the garage?

A. I would say at least 20, 25 feet.

Q. So the struggle took place—I will mark it, 1, 2, 3, is that right? A. Yes, sir.

Q. Is that about right? A. Right.

Q. Came out of the car, got on his knees? [107]

A. Yes, sir.

Q. Then you and Sousa and he ran away to here? A. Yes, sir.

Q. And all the other officers came on?

The Court: I think we will leave it there for the day. Due to complications involving tomorrow and Wednesday morning, we will have to continue this case at this time until Wednesday afternoon at two. Is it two?

(Testimony of William K. Wells.)

Mr. Hoddick: Yes, your Honor.

The Court: All right. So until Wednesday at two, you are excused.

(The Court adjourned at 4:05 p.m.) [108]

Honolulu, T. H., December 7, 1949

(The Court convened at 2:00 p.m.)

The Clerk: Criminal No. 10,256, United States of America versus Orestus Cavness, for further trial.

The Court: Are the parties ready?

Mr. Miho: Yes, your Honor please, ready for the Defendant.

Mr. Hoddick: Ready for the Plaintiff.

The Court: Note the presence of the Jury and of the Defendant. Mr. Wells, you are the same Mr. Wells who heretofore has testified in this case?

The Witness: Yes, sir.

The Court: You are under oath. You may proceed; proceed with your cross-examination.

WILLIAM K. WELLS

a witness on behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

Cross-Examination (Continued)

By Mr. Miho:

Q. Mr. Wells, you rememer testifying before the U. S. Commissioner, Harry Steiner, at the prelimi-

(Testimony of William K. Wells.)

nary hearing? A. Yes, sir.

Q. Do you remember stating before that Commissioner [109] and in my presence that the officers who joined you after you approached Cavness were Whitford, Sousa and Shaffer and Abbey?

A. Yes, sir, and I think I included Sasaki.

Q. If I stated to you that you never mentioned officer Sasaki's name, would that be another mistake on your part? A. Yes, sir.

Q. Well, the actual truth is, then, that Sasaki, as you testified here the other day in this Court, that Sasaki was also with you?

A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. So that what you may have stated before Judge Steiner is a mistake if you did omit Sasaki's name?

A. Well, I just omitted officer Sasaki's name.

The Court: Well, now, let's get that straight. You haven't got a transcript of that, have you?

Mr. Miho: I have not. Just my notes.

The Court: Well, neither of you know what he said. He can't remember and you are not positive.

Mr. Miho: Well, I just stated to him whether he mentioned Sasaki's name and he said he wasn't sure or words to that effect.

The Court: Well, anyway, the point is that neither of you have an accurate transcript of what went on at the [110] preliminary hearing. All you have are your notes and all he has is his memory.

(Testimony of William K. Wells.)

Mr. Miho: I took pretty copious notes at that hearing.

The Court: Well, that doesn't make them the official record.

Mr. Miho: No, I am attacking his credibility on the recollection and his statement which I am reading back to him.

The Court: You are getting near the line of inferring that you have an accurate report of what he did say, and I know you want to be fair.

Mr. Miho: Absolutely fair.

The Court: And all I want to do is to make it clear to everyone that you are not representing that you have an official transcript.

Mr. Miho: No, your Honor please.

The Court: All right.

Q. (By Mr. Miho): Well, the truth of the matter is now that Sasaki was present with you?

A. Yes.

Q. Together with Whitford?

A. Whitford, Sousa, Shaffer and Abbey.

Q. And Abbey? A. Yes, sir. [111]

Q. Now, you also stated at the hearing the other day here that some officers were stationed at the Waikiki Fire Station? A. Yes, sir.

Q. Will you name those officers who were waiting for you, for your signal, at the Waikiki Fire Station?

(Testimony of William K. Wells.)

A. They were officers Harry Pestano, Francis Ferry, Roger Marcotte, and Oliver Roberts.

Q. Oliver who? A. Roberts.

Q. However, Captain Whitford——

A. Captain Whitford was with me.

Q. ——was with you?

A. In Mr. Abbey's house before the raid.

Q. Well, will you name who were with you at Reserve Officer Abbey's house?

A. Was Captain Whitford, Sergeant Alfred Sasaki—I mean Sergeant Alfred Sousa, and Richard Sasaki, Officer Paul Shaffer, Reserve Police Officer Arthur Abbey, and myself.

Q. Where was Officer Marcotte?

A. Officer Marcotte was at the Waikiki Fire Station.

Q. With the rest of the officers? A. Yes.

Q. Now, you had a pre-arranged signal to notify them when Cavness returned, or when you wanted them to assist you, [112] is that right?

A. One of the officers went and telephoned them.

Q. Went and telephoned them?

A. Yes, sir.

Q. And who was that officer?

A. I think it was Officer Sergeant Sousa.

Q. Sergeant Sousa? A. Yes, sir.

Q. And when did he telephone them, if you know?

(Testimony of William K. Wells.)

A. I really don't know when he telephoned them.

Q. Did you instruct the other officers to instruct them who were waiting at the fire station?

A. Well, the pre-arrangement we made was that one of the officers was to telephone them.

Q. Telephone them when?

A. Right after Mr. Cavness returned.

Q. You gave the signal, did you not, I presume?

A. No, sir, I didn't instruct Sergeant Sousa to go to the telephone.

Q. You did not? A. No, sir.

Q. Anyway, when Cavness returned you were the first to leave Officer Abbey's house?

A. Yes, sir.

Q. And you walked over to Cavness' car? [113]

A. Yes, sir.

Q. And who went with you at that time?

A. Was followed by—I remember then, I think it was Sergeant Sousa who was in the back of me, followed by the other officers.

Q. Sergeant what? A. Alfred Sousa.

Q. Sousa was behind you? A. Yes, sir.

Q. He was the first officer behind you?

A. Yes, sir.

Q. And who else was with or behind Sousa?

A. I really don't—

Q. You don't know? A. No, sir.

Q. Well, did all of the officers who were waiting with you in Officer Abbey's house come out when you came out?

(Testimony of William K. Wells.)

A. They followed me out, yes, sir.

Q. Followed you out? A. Yes, sir.

Q. But all you remember is that Sousa followed in the immediate back of you? A. Yes.

Q. Will you go to the map and place yourself in the position you first approached the Defendant when you came [114] to him?

The Court: Do you want that board closer?

Mr. Miho: I believe that would be better, if your Honor please.

The Court: Mr. Clerk and Mr. Bailiff, would you move it closer so that they can see it better. Mr. Wells, you have a tendency to write very small. I suggest that you make bigger marks. And Mr. Miho, do you want that request executed on that drawing that is already on the board?

Mr. Miho: A larger drawing on the right hand side, if your Honor please, would be much clearer.

The Witness: Of this here?

Mr. Miho: Yes.

The Witness: Do you want me to draw it to the best of my recollection?

Mr. Miho: Yes, just a rough draft.

(Witness writes on blackboard.)

The Court: In the drawing you are asking him to make, Mr. Miho, I infer that you are not concerned with the house diagram?

Mr. Miho: Just the garage.

The Court: And the yard?

Mr. Miho: The yard.

(Testimony of William K. Wells.)

The Witness: The garage and the yard. Here is the garage. Do you want me to draw the automobile? [115]

Mr. Miho: Yes, please.

A. I came out from over here and I was over here where the X is, and with Mr. Sousa in the back of me.

Q. Put the garage in, please.

A. This is a small open garage.

Q. Well, isn't there a building? Indicate the garage.

A. Here is the building here and this is more of a small room in the back here. There is a fence over there. This is more of an open garage.

Q. More of an open garage?

A. Open garage.

The Court: No roof?

The Witness: To the best of my recollection, no roof.

Q. How many times have you been near that, have you observed that house?

A. Well, I haven't observed it very closely in front of the place. I parked down about 200 yards down towards Koko Head side.

Q. Have you had that house under observation since October of last year, something like that, did you not?

A. No, sir, not since October last year.

Q. When? A. Around June.

Q. Around June? A. Yes, sir. [116]

(Testimony of William K. Wells.)

Q. July? Of this year?

A. Of this year.

Q. Well, more or less continuous since that time, you have had that house under observation continuously? A. Not continuously.

Q. Well, how many times did you see that house and garage? A. Many occasions.

Q. Many occasions, and you still don't remember whether that garage has a roof or not?

A. To the best of my recollection it is an open garage, an open roof.

Q. You mean there is no roof?

A. To the best of my recollection. There is a roof back here that comes out here. I would call it a lean, what comes out, that what you call it—is that what you call it?

Q. Now, to come back to your prior statement, didn't you state to us yesterday that Officers Whitford, Sasaki, Shaffer and Abbey were the only ones that followed you to the house when you came out of Officer Abbey's house?

A. I may have made that statement. Officer Sousa was with us.

Q. Are you sure he was with you?

A. Yes, sir.

Q. So that if you stated yesterday that Sousa—if you [117] did not mention Sousa's name you were mistaken? A. I was mistaken.

Q. Do you remember making this statement yesterday in my cross-examination, my question to you being,

(Testimony of William K. Wells.)

“And when you came up to the premises you stationed the seven or eight officers in a house across Leahi Avenue,” and your answer being,

“No, sir, Whitford, Sasaki, Shaffer and Abbey followed me out to the house; the others were at the Waikiki Fire Station,”

do you remember that statement?

A. Yes, sir.

Q. You did not mention Officer Sousa's name at all? A. I forgot to include him.

Q. And yet Officer Sousa you stated at one time was the officer who came to your first assistance?

A. That's right.

Q. And you stated a few minutes ago here that Officer Sousa is the one you remembered specifically approaching the Defendant with you?

A. In the back of me, yes.

Q. And that you don't remember the others, whether they were actually behind you or not?

A. They followed me out of the house.

Q. They followed you out of the house? That part you [118] remember? Whether they were behind you or how many feet behind you and Officer Sousa when you approached the Defendant you did not know, you said there a while ago?

A. That's right.

Q. But yesterday you were pretty certain that they followed you? A. Yes, sir.

Q. And what you stated is a mistake and what you state today is a correct answer?

(Testimony of William K. Wells.)

Mr. Hoddick: I object to that. It is not a question of whether it is a mistake. He has now given them all to you.

Mr. Miho: I am just trying to get the record straight.

The Court: The record will speak for itself.

Mr. Miho: Will you answer the question?

The Court: The objection is good. It is argumentative. The record speaks for itself. Whether he made a mistake or not is something that you can argue from what he said yesterday and today. It isn't for him to say whether he has made a mistake or not. The record will reflect whether he has or not.

Mr. Miho: I am trying in my cross-examination, since it is very material to the defense, to find out how good his recollection is, your Honor. He has made positive statements. Now he admits that he made a different statement yesterday, [119] that he left out this Officer Sousa whom he mentioned today. So I am just trying to ask him whether he made that statement yesterday or not. I am not saying he is a liar. I am just asking him whether he made that mistake yesterday.

The Court: Well, I understand you to have agreed that yesterday he did not include Sousa's name and that he left it out yesterday, and today he put it in. Now, whether he made a mistake or not is for the record to bear out on the basis of an argument advanced on that score.

(Testimony of William K. Wells.)

Mr. Miho: I will withdraw the question.

The Court: The Jury will determine it.

Q. (By Mr. Miho): Now, Mr. Wells, you are positive of one thing, then, that as you approached the Defendant at that spot Officer Sousa was behind you? A. Yes, sir.

Q. And when you touched the Defendant Officer Sousa was the one that came to your rescue first?

A. When the Defendant shoved me, then I touched him and then Officer Sousa was the first to come to my assistance.

Q. Now, at that time when the Defendant shoved you, how far away were you from his arm?

A. I was right up about I think, about six inches.

Q. He was still in the car, the Defendant?

A. Yes. [120]

Q. That is certain?

A. He was in the car, yes.

Q. And Officer Sousa was where?

A. He was right in the back of me.

Q. Now, there are two large coconut trees about four feet away from where the car driveway is, is that right? A. Yes, sir.

Q. And a high hedge about at least five feet next to the coconut, immediately adjacent to the coconut tree, all the way to the front, mock orange hedge? A. Yes, sir.

Q. And it is a very thick hedge, is it not?

A. It is quite thick.

(Testimony of William K. Wells.)

Q. In fact, all the leaves are intermingled making it a completely intermerged fence or hedged fence?

A. Well, I didn't examine the hedge closely. I know it is very thick.

Q. Well, nobody could run through that mock orange fence, could they?

A. I really don't know.

Q. Didn't you notice the hedge that is five feet tall, hedge?

A. You are talking about the hedge?

Q. On the lefthand side as you face the garage.

A. That is on the Koko Head side of the garage? [121]

Q. It would be on the makai side towards the sea. I will point it out to you.

A. I didn't go back there. Are you talking about the hedge here (indicating on blackboard)?

Q. Here.

A. Oh, that. I would call it the Koko Head side of the house.

Q. Well, I won't argue on that. But on that hedge that I just showed——

A. This hedge is very thick.

Q. Very thick and very tall?

A. Tall, yes, sir.

Q. Nobody could run through this hedge at any point, could they, from the end of this house to the end of this side?

A. Well, I really don't know. I can't answer that question.

(Testimony of William K. Wells.)

Q. What about the hedge on this side? There is a hedge just as thick in the front, is that right?

A. I don't think this hedge is as thick as this one here (indicating on blackboard).

Q. Well, could anyone run through that hedge, put his body——

A. I really don't know.

Q. You don't know? [122]

A. No, sir.

Q. Now, I have drawn some diagrams indicating these two lines as being a driveway. There is actually a garage, a fairly good-sized garage, as I have indicated on that map, is that right? With a little protruding on this side, is that right? With a roof and with a wall and a wire meshing in front and on the side?

A. Not to the best of my recollection.

Q. Mr. Wells, as a matter of fact that garage door was always and on that particular day was completely closed, was it not, so that nobody could get into that garage?

A. I really don't know. To my recollection, there is no—I didn't see any door there. Maybe I should have had this further out (referring to drawing on blackboard). This is more like a storage room to me, Mr. Miho.

Q. Well, that garage is as long as from where you are standing to the end of this platform, is it not?

A. To me it is an open garage.

(Testimony of William K. Wells.)

Q. Will you answer my question? That garage is as long as this platform, is it not?

A. About that, yes, sir, maybe.

Q. And how many feet would you say the length of this platform is—20 feet?

A. About 20, 22 feet.

The Court: Are you both talking about the same thing? [123]

Mr. Miho: I believe so, your Honor please, the width of this garage, as I have indicated on the map.

Mr. Hoddick: I object to Counsel in effect testifying as to the existence of a garage or not. I don't know whether you are asking Mr. Wells to indicate a garage on the map or something like that. But you are inferring that such a garage does exist there. As I gathered from Mr. Wells, what he has described has been a mere driveway which has no roof over it.

Mr. Miho: I beg to differ.

Mr. Hoddick: He said several times, to the best of his recollection there is no roof.

Mr. Miho: I will ask him again if you want.

Mr. Hoddick: Go ahead.

Q. (By Mr. Miho): Is there a garage such as I have indicated on that diagram there?

A. To the best of my recollection—what do you call?—it is an open garage.

Q. I am asking you a simple question. What kind of a garage can come later. I am asking you

(Testimony of William K. Wells.)

a simple question. Is there or is there not a garage such as I have indicated on this map, the length of which being about 20 feet, Mr. Wells?

A. I dont recollect. [124]

Q. Would you deny that there is such a garage?

A. I don't deny it. It could be.

Q. You don't deny it?

A. It could be.

Q. You just don't recollect?

A. That's right.

Q. And so you don't recollect, you don't recollect whether this garage was closed or open even, you don't recollect that, do you? A. No.

Q. Would you recollect whether this garage has in the front of it wire mesh? Here is the roof and wooden platforms with a small door here and a handle; that this is the front of the garage; that there is a wooden mesh like this—I mean a wire mesh and a wooden wall and a small door here——

Mr. Hoddick: Mr. Miho, the witness already told you that he doesn't recollect the existence of it.

Mr. Miho: Your Honor, this is cross-examination. I have a perfect right to go into this.

The Court: You may answer.

A. No, sir.

Q. You don't recollect that either?

A. No, sir.

Q. Would you deny that there is, that the front was like that when you went there? [125]

(Testimony of William K. Wells.)

A. I don't recollect.

Q. Would you deny it, that there is, that the front is like that?

A. I don't recollect.

Q. You don't recollect? A. No.

Q. But you wouldn't deny it? A. No.

Q. There might be? A. There might be.

Q. And there are two coconut trees, large ones like this, about four feet from the side of this driveway, are there not?

A. To the best of my recollection there's two coconut trees as you go on your left.

Q. And there is a complete wire fence on this side that nobody could go through from the hedge to the end of the garage, is there not?

A. If I remember correctly the wire fence is in the back here.

Q. Isn't there one in the front? There is one fence, wire fence as high as the garage roof on the front, as I have indicated, and also another one in the back, a similar wire fence with, a wire fence where the dog plays, isn't there?

A. To the best of my recollection only one I remember, [126] that is the one in the back here.

Q. But you don't remember that there is a wire fence from the side of the garage to the Koko Head side that you said to the hedge fence?

A. No, sir.

Q. As high as the garage roof? You don't recollect this?

(Testimony of William K. Wells.)

A. Not this one. The first one. I recollect the one in the back here, yes, sir.

Q. Would you deny that there is such a wire fence? A. I said I don't recollect.

Q. Well, I said would you deny it?

A. It could be there that I didn't observe.

Q. Now, when Mr. Cavness drove in with his car, the back of his car was just about even with his front property line, is that right, not as you have indicated but in about this position, isn't that right? A. A little inside.

Q. Inside the hedge?

A. The hedge, yes, sir.

Q. And you walked in through this way?

A. Yes, sir.

Q. Right? Mr. Abbey's house is on this side?

A. Yes, sir.

Q. Immediately across? [127]

A. Yes, sir.

Q. And you were the first to get in?

A. Yes, sir.

Q. And then Officer Sousa followed you?

A. Yes, sir.

Q. And all the officers, the other officers were behind you, right, so far as you can recollect?

A. So far—I think a few of them came from the front. I don't remember who.

Q. In other words, the four or five officers, or six officers, or nine officers who came later on, they surrounded the entire section here, is that correct, in-

(Testimony of William K. Wells.)

dicating to you; officers in the front of the car, officers this way? This, as I indicated with two lines here, semi-circular lines—the only escape so-called, the only place where anyone could get away would be this section here and this section here, is that right? A. Yes, sir.

Q. So that if anybody wanted to get away from the people they couldn't have, is that right? They could not have gotten away from you and your officers, is that right?

A. I don't think so.

Q. And yet you felt you had to subdue this Defendant by force, did you not?

A. Well, he struggled first. [128]

Q. You stated that the only struggle he made was to shove you, is that right?

A. Shove me and when we tried to get the Vicks inhaler tube in his right hand he struggled.

Q. He struggled? A. Yes, sir.

Q. And he had his Vicks inhaler tube in his right hand? A. Yes, sir.

Q. Now, as he came out of the car, you testified that he had his left door a little open?

A. The left door was open.

Q. And his right foot was a little out?

A. His left foot was out.

Q. And then as you approached him—is that right?—A. Yes, sir.

Q. —you testified yesterday, did you not, that you instructed—I may be corrected—that Officer

(Testimony of William K. Wells.)

Abbey used a blackjack to open Cavness' hand, is that right?

A. To force his hand open.

Q. You saw that yourself? A. Yes, sir.

Q. And that it was the left hand that Officer Abbey struck with his blackjack, did he not?

A. Yes, sir.

Q. Well, did he also have another Vicks inhaler in his [129] left hand?

A. He had a piece of the Vicks inhaler tube in his left hand.

Q. You didn't say that yesterday, did you?

A. I think in my testimony I testified where he, where his left hand—we had him down, stomach down on the ground, with his left hand this way (indicating).

Q. You never said that he had a Vicks inhaler tube in his left hand, did you? A. Well——

Mr. Hoddick: Are you asking him that, Mr. Miho?

A. ——Mr. Miho, I misunderstood your question. I meant that we forced his left hand open with a blackjack.

Q. And what came out of it?

A. I didn't see anything come out of it.

Q. You were right there, weren't you, a few feet away?

A. I was right there, but then Abbey—what do you call?—forced his left hand and he got up and I got up.

(Testimony of William K. Wells.)

Q. But you didn't see anything fall out, did you?
A. No.

Q. His left hand came open?

A. It was forced open.

Q. It was open? A. It came open.

Q. But you didn't see anything fall out? [130]

A. It was forced open and he had his hand like this (indicating).

Q. You saw his hand opened?

A. Opened this way.

Q. Nothing came out of it?

A. I didn't see it.

Q. All right. But you were right there a few feet away?
A. I was right there.

Q. Do you recall who it was that stepped on Cavness' hand with his foot?

A. I didn't see that.

Q. You didn't see that? Do you remember seeing his hand bruised later on when you took him to the emergency hospital?
A. No, sir.

Q. You don't remember that?

A. I don't recall that.

Q. Well, you don't recall it?

A. No, sir.

Q. It could have happened?

A. It could have.

Q. Do you remember his bruises on his face, black and blue marks on his face? He is a dark man but did you see any bruise marks on his face?

A. The only bruised marks I saw is that cut on his mouth.

(Testimony of William K. Wells.)

Q. That was a swollen open cut on his mouth, is that right? A. It was a cut, yes.

Q. It was cut from the outside clear to the inside, was it not?

A. I don't now how deep it was.

Q. Well, didn't you take an interest to see how badly injured your bleeding defendant was, you, the man in charge? Weren't you interested?

A. I looked from the outside and saw the cut. I asked him if he was all right. He said yes.

Q. Will you come close and look at that lip, this side? Do you recall anything now about whether he was cut up on the inside or not?

A. I don't recall looking into his mouth.

Q. You don't recall? A. No, sir.

Q. You never looked in his mouth?

A. No, sir.

Q. And you say he got that injury on his mouth because he was trying to bite a Vicks inhaler?

A. That is the best of my recollection.

Q. Would you deny that he received a blow in his face [132] with a fist, somebody's fist, as well as a blow on his lips at any time during that struggle? Would you deny that somebody hit him on his face?

A. I didn't see anyone strike him.

Q. Would you deny that he was struck? I am asking you whether you would deny that he was struck?

A. I said I didn't see anyone strike him.

(Testimony of William K. Wells.)

Q. I still ask you, would you deny that he was struck on his face by someone?

A. I said I didn't see anyone strike him.

Q. Mr. Wells, under oath you cannot deny that somebody might have struck him on his face, can you?

A. I didn't see anything. Like I told you, when I had him around the waist here, how could I see if someone hit him on the back. I haven't got eyes in the back of my head.

Q. But you recall a lot of other things, do you not, in detail?

A. Yes, sir.

Q. But that part you don't remember?

A. I didn't see it.

Q. And you wouldn't deny or refuse to deny that?

A. I didn't see anybody strike him.

Q. But you were there throughout the struggle?

A. I was there, yes, sir. [133]

Q. Now, when he first fell down, as you say, on his knees as he came out of the car, at that time he was bleeding in the back of his head, was he not?

A. No, sir.

Q. When did he begin to bleed?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Well, how do you know whether he was bleeding the first time or not?

A. He could have bled the first time when he fell down.

(Testimony of William K. Wells.)

Q. He could have? A. Yes, sir.

Q. So you don't know actually?

A. When he got up I was trying to get the evidence from him. I was interested in that Vicks inhaler tube.

Q. And you didn't care what——

A. No, wait a minute. To take it away from his hand.

Q. I asked you, you didn't care how you got it, did you? You didn't care how you got it, did you? Answer the question.

A. I wasn't using force to try to get it from him.

Q. You were smart enough? You were trying to get somebody else to use force, weren't you?

A. I didn't advise anyone to use force on your defendant. [134]

Q. But you didn't stop anyone from using force and violence on this defendant, did you?

A. We didn't use any force on your defendant.

Q. Oh. Then will you explain——

A. We tried to subdue the defendant when he was trying to struggle with us, trying to get rid of the inhaler tube.

Q. You didn't use any force on him?

A. Holding his hand.

Q. I am asking you. You just stated you didn't use force.

A. I was trying to hold his hand. I wouldn't say that is force.

(Testimony of William K. Wells.)

Q. You just stated that you didn't use any force on him at all. You just tried to subdue him, is that right? A. That's right.

Q. Well, if you didn't know who hit him, how do you know whether you used force or not?

A. I just told you that I didn't see anybody hit your defendant.

Q. Well, then, how do you know whether force was used on him or not if you didn't see so many things that caused this bleeding and caused this bloodshed?

Mr. Hoddick: Mr. Miho, are you through with the blackboard drawings? [135]

Mr. Miho: Yes.

Mr. Hoddick: I'd suggest that you take the stand again (to the witness).

The Court: Read the last question.

(The reporter read the last question.)

A. All I can testify is I didn't use any force on him.

Q. In other words, you are trying to protect your brother officers, is that right?

A. I am not trying to protect anybody.

Q. You are here to tell us the entire truth of what you saw happen?

A. That's right, sir. And I am telling the truth to the best of my knowledge.

Q. And the benefit of your 28 years' experience?

A. I am up here to tell the truth and nothing but the truth.

(Testimony of William K. Wells.)

Q. So help you God. Now, how does it happen, Mr. Wells, that if you were right there and you saw the defendant with this Vicks inhaler or something, something in his right hand and also something in his left hand, and these officers were helping you to get that something from his hand, that you did not see anything immediately after the struggle? Will you explain that?

A. Like I told you, I had a hold of his waist and my head was down this way (indicating). [136]

Q. But as an experienced, long-time experienced narcotics agent——

A. Yes, sir.

Q. After he was subdued, as you described yesterday, you must have looked around, didn't you?

A. No, sir.

Q. For the evidence that you struggled?

A. As soon as his hand opened, he immediately asked me to take him inside, which I did. Officer Abbey and Sousa stayed outside. I took the defendant immediately inside.

Q. Why did he ask you to take him inside?

A. I don't know.

Q. You don't know? A. No, sir.

Q. Wasn't it then because he was groggy and hurt and sore and scared and bleeding? Wouldn't that have been the reason?

A. I don't know.

Mr. Hoddick: That's asking for a conclusion on the part of the witness.

The Court: He already answered, "I don't know."

(Testimony of William K. Wells.)

Q. In other words, you are saying that you didn't look around for this so-called evidence after the struggle? A. I did afterwards.

Q. Immediately after, I am talking about. [137]

A. Immediately after we subdued him. He asked me to take him inside. I took him inside and served the warrant on him. That's what I was interested in, serving the search warrant on him.

Q. I am asking you, Mr. Wells, from your 28 years' experience to get the continuity of the evidence in any case is very important, is it not?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

A. And it is absolutely important to be as careful as you can to connect the evidence up with any person charged with any crime, is that right?

A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. And yet in this case, after all this struggling, you did not look for this evidence, is that right? You just stated so in so many words.

A. I was interested in serving the search warrant on him first.

Q. You also admit that this defendant could never have run away from you people, is that right? A. He tried to.

Q. Even if he tried to, you new that he could never [138] get away from you people, is that right, from you and your brother officers?

A. That's right.

(Testimony of William K. Wells.)

Q. But you still felt you had to subdue him by force, is that right?

A. He struggled. He started struggling first.

Q. You stated yesterday he never lifted his hands at any time excepting for that first shoving, did you not? Didn't you say that yesterday?

A. You mean lift his hand to what, to hit us or what?

Q. To hit you people or shove you or knock you down or anything?

A. Well, he tried to get away from us and then trying to get a hold of that Vicks inhaler tube in his hand.

Q. So he did some struggling?

A. Well, it was quite a struggle there.

Q. After that first shoving did he take a blow at you, a poke at you?

A. He tried to run away from Officer Sousa and myself.

Q. Now, all of this evidence, if I remember your statement before the Commissioner and before this Court yesterday, all of this evidence upon which you based your case, was delivered to you by the specific officers at the vice squad in Honolulu and not at the scene, is that right?

A. Yes, sir, that's right. [139]

Q. You had never met Cavness in your life before this time, is that right?

A. I have seen him on many, many occasions on Smith Street in his barber shop, walking up and down.

(Testimony of William K. Wells.)

Q. But so far as you know, the Defendant had never known or met you in his life, is that right?

A. I think he knows who I am.

Q. I asked you whether you had ever met him.

A. I never met Mr. Cavness, no, sir.

Q. Now, Mr. Wells, who else has access to your strong box that you described yesterday where you keep your——

A. Just myself.

Q. If you are away on a trip or if you were ill or died tomorrow, who could get into the strong box?

A. Nobody.

The Court: Excuse me. It was of interest to me yesterday that he kept saying strong room.

The Witness: Strong room.

The Court: You talked about a strong room or a strong box?

The Witness: It is the name—what do you call?—the Bureau requested that we have a strong room where all our evidence is kept after it is seized.

Q. It is a complete room?

A. It is nine feet by six and is right up to the ceiling.

Q. No windows?

A. It has a window on the Waikiki side of the room with bars in it. That is at the Young Hotel, room 575, Alexander Young Building.

Q. In a transom?

A. No, sir.

Q. Just a window with bars in it?

A. Bars, yes, sir.

(Testimony of William K. Wells.)

Q. And what kind of a lock does it have?

A. I have a Yale lock and another big padlock with two big eyes with a rivet inside the door, something like an eye.

Q. How many times since you first put this, put all these in, put all this so-called evidence in, marked for identification "A" to "F" yesterday, since you placed it in, I believe you said you placed it in some time on July 22nd of this year——

A. I placed it on July 19th.

Q. Nineteenth? A. The first time.

Q. Well, since that date to the day before yesterday or yesterday, the day before yesterday, when you brought them out for presentation in court here, how many times have you been in that strong room?

A. That is from July 19th up to—I would say sometimes on an average of five times a week, and other times maybe three, four times a week.

Q. You go in there quite often every day?

A. I go in there because a lot of the drugs that are surrendered by drug stores and doctors after I seal it I place it in the strong room.

Q. And in this room you just leave it on different shelves, is that right?

A. I have at least six shelves there.

Q. And you are absolutely certain that nobody else has access to that strong room except you?

A. No, sir, because I am responsible, I am held responsible for anything missing in that strong room.

(Testimony of William K. Wells.)

Q. Where do you keep your keys?

A. Right on myself.

Q. Day and night?

A. Day and night, yes, sir.

Q. Have you got your badge with you by any chance today? A. Yes, sir.

Q. Will you show it to us, from there? (Witness shows a badge) Is that the same badge you had that day? A. Oh, yes.

Q. When you had this altercation with the Defendant? [142] A. Yes, sir.

Q. And that's what you held in your hand?

A. Left hand.

Q. How did you hold it? (Witness indicates) You held it like that? A. Yes, sir.

Q. And throughout the struggle you held it?

A. No, I first went down—someone—then I got it out of my pocket.

Q. How?

A. I automatically—what do you call it?—stuck it in my pocket.

Q. But when you grabbed Cavness you had that in your left hand and grabbed him at the same time?

A. When I grabbed Cavness I had also—what do you call it?—the search warrant. I grabbed his left hand and when we went down I stuck, I got the warrant in my right pants pocket—

Q. Oh, you did it right away? You put the one in one hand—

(Testimony of William K. Wells.)

A. It happened like that. (Indicating)

Q. Wasn't there a continuous struggle from the moment you grabbed hold of him?

A. When he came out of the car, Sergeant Sousa was in the back of me then. [143]

Q. Wasn't it a continuous struggle from the moment you first approached Cavness?

A. When he came out of the car, yes, sir.

Q. There was no moment or let-up at any time until he was subdued, is that right?

A. That's right.

Q. But you had time to put your search warrant in your pocket and your badge in your other pocket?

A. Yes, sir.

The Court: The first time on that first fall, so to speak, I heard the pronoun "we." I don't know what that means.

Q. Yes, will you explain that? The first time when Cavness fell down you spoke of "we."

A. Oh, that was Alfred Sousa and I. The Sergeant had a hold of him from his right in the back here.

Q. Well, didn't you state, didn't you state, make a statement before the U. S. Commissioner that Officer Sousa or Shaffer, one of the two, I don't remember exactly who, did you state before the U. S. Commissioner that one of these officers, Sousa or Shaffer, reached into the car and grabbed Cavness from the car and pulled him out?

A. No, sir, I didn't make such statement.

(Testimony of William K. Wells.)

Q. You didn't make such a statement?

A. No, sir. [144]

Q. So that the only man who touched Cavness when he was in the car was you?

A. Myself, and when he was on his way out Officer Sousa.

The Court: Mr. Wells, did anybody except the Defendant fall down on that occasion that you were talking about when he was out of the car? Did you fall down?

The Witness: I was half-way down on my knees.

Q. I asked you yesterday when you grabbed his left hand, did that result in his being pulled out of the car, and your answer was, "I think so." You continued: "And then Mr. Cavness fell to the ground on his knees. We got him up." Who did you mean by "we" then?

A. Sergeant Alfred Sousa and I.

Q. "We got him up." Officer Sousa and you, you say? "And he tried to get away from us." That is still you and Sousa? A. Yes, sir.

Q. "To run towards the back of the——" You didn't finish that sentence.

A. That is in the back of the garage. That is towards, I would say, towards the sea.

Q. Towards the front of his car?

A. That's right.

Q. "Then Mr. Whitford came to our assistance and he [145] then fell to the ground again."

(Testimony of William K. Wells.)

A. That's right.

Q. You saw all that? A. Yes, sir.

Q. How did he fall to the ground when Whitford came to the scene? Tell us.

A. Well, I don't know how he fell.

Q. You were right there, weren't you?

A. I don't know how he fell.

Q. Did he stumble on anything or——

A. He could have. Or maybe he got, maybe one of the boys—Al Sousa was a little too close to him.

Q. But he fell, that is the main thing.

A. He fell.

Q. But he didn't hit his head on anything, you told us yesterday? A. That is right.

Q. In fact, you told us he didn't hit his head on anything at any time during the struggle, is that right?

A. To my recollection he didn't, no, sir.

Q. But he was bleeding in the back, that you remember? A. Yes, sir.

Q. "Now, he got up and then we were assisted by the other officers." Whom did you mean by the other officers? All of them? [146]

A. That's officers Shaffer, Sasaki, Abbey.

Q. Sasaki? A. That's the other three.

Q. And what did they do? What did you mean when you said "They came to our assistance"? What did you mean by that?

A. We all struggled with the Defendant then.

Q. Nine of you, all nine of you?

(Testimony of William K. Wells.)

A. There wasn't nine.

Q. How many?

A. I think there were six of us.

Q. Oh, the others hadn't come yet?

A. No, sir.

Q. They were still on their way? Or they were watching as watchmen to the possible entrances of escape, is that right? Is that what you are trying to tell us?

A. You mean the other four officers?

Q. Yes.

A. They were about, I would say, about a half mile away.

Q. They were at the Waikiki Fire Station or they hadn't arrived at the scene? A. No, sir.

Q. And who were there at the Waikiki Fire station? A. Officers Ferry—— [147]

Q. Yes? A. ——Pestano——

Q. Yes? A. ——Oliver Roberts——

Q. Yes? A. ——and Marcotte.

Q. You never mentioned Officer Roberts yesterday, did you?

A. I don't remember if I didn't mention him or not.

Q. Officer Roberts and the others came to the scene later on? A. Later, yes, sir.

Q. Roberts? And they all came together with Roberts to the scene? A. Yes, sir.

Q. After the struggle was all over?

A. Yes, sir.

(Testimony of William K. Wells.)

Q. After the struggle was all over?

A. Yes, sir.

Q. Then you continued, "He got up and then we were assisted by the other officers." And by that you mean Shaffer, Abbey, Sasaki and Whitford?

A. You mean the second time?

Q. Yes.

A. The second time Whitford was assisting us, and the [148] other three came to our assistance.

Q. First you had Sousa assisting you?

A. Yes.

Q. Then he fell down and then he fell down again? At that time Whitford came to your assistance?

A. That's right.

Q. So Whitford was helping you and Sousa subdue Cavness—right?

A. Yes, sir.

Q. Three of you? And when he got up the second time you got Shaffer, Abbey and Sasaki to help you?

A. Yes, sir.

Q. So that there were six of you?

A. Six, yes, sir.

Q. And when he tried to get up the second time, all six of you were trying to subdue him?

A. That's right.

Q. And when you stated, "We struggled there for about three or four minutes."

A. About that.

Q. Three or four minutes?

A. Yes, sir.

Q. Now, you know how long three or four minutes is, do you not? That is not a wild guess?

(Testimony of William K. Wells.)

A. Approximately three or four minutes. It could be [149] less.

Q. And all that time, so far as I recollect, your statements up to now, certainly the last time,—I mean the second time—Cavness did not, after struggling, shoving you the first time, Cavness did not hit back or struggle with you at all, is that right?

A. The only thing he tried to do is to get away from us.

Q. That's all. A. Yes, sir.

Q. "Then we finally got him down on his stomach and I had a hold of his left hand, by his left wrist I would say, and Mr. Whitford had his right hand, and I heard Mr. Whitford—they were trying to get his hand open." Who do you mean by "they"? All of them?

A. I think it was Whitford and Abbey.

Q. "And they couldn't. So Abbey struck Mr. Cavness' hand several times and it opened." But later on you said he struck him, in my cross-examination, that Abbey struck Cavness with his blackjack—right?

A. I said blackjack. That's what he used on the top of his wrist.

Q. Do you remember saying also that "I had Mr. Abbey strike Mr. Cavness' left hand to open it"? "I had Mr. Abbey——" [150]

A. I asked Abbey to try to force his hand open. He couldn't. And then he hit it with the blackjack.

(Testimony of William K. Wells.)

Q. Well, you made a statement that "I had Mr. Abbey strike Mr. Cavness."

A. That's right. I said "I," yes, sir.

The Court: Mr. Wells, don't talk while the question is being asked. Wait until it is finished.

The Witness: I'm sorry, your Honor.

Q. Mr. Wells, if I remember your testimony correctly, you have not mentioned Officer Pestano as being at any time in the struggle, is that correct?

A. That's right. He wasn't in the struggle, no, sir.

Q. When did he appear on the scene?

A. He appeared on the scene with the other officers. He was down in the——

Q. Fire station? A. Yes, sir.

Q. Now, the officers, other officers from the fire station came to the house or to the premises about how many minutes after you, after the struggle was all over, approximately? Five minutes? Ten minutes?

A. It could be anywhere from five to ten or fifteen minutes.

Q. Five, ten to fifteen minutes?

A. Approximately, yes, sir. [151]

Q. And they joined you after you were all in the house then, is that right? The struggle was all over and you immediately went to the house, you say?

A. If I remember correctly, they joined us when we came back outside again.

(Testimony of William K. Wells.)

Q. The second time? A. Yes, sir.

Q. You never stated at any time that Officer Pestano indicated that he had found anything at the premises, did you?

A. In my testimony?

Q. Yes.

A. If I remember correctly I—I don't recall, sir.

Q. You don't recall? A. No, sir.

Q. But who handed you what kind of evidence is quite important, is it not? A. Yes.

Q. But you don't remember, is that right?

A. I thought—I recall mentioning his name, that I received that.

Q. At the vice room?

A. Vice squad, yes, sir.

Q. But when he indicated he found any object of any importance at the scene, you don't remember?

A. Well, he told me that he found that in that sport [153] shirt, I would say removable closet in the rear room.

Q. What he found?

A. A Vicks inhaler tube with the inside broken off.

Q. He found it in the house of the Defendant?

A. Found it in a sport shirt, sport jacket, in the—it's what I call a removable closet, a big closet. You could shove it from one end to the other.

Q. You know whose sport shirt that was?

(Testimony of William K. Wells.)

A. At the time?

Q. You don't know, do you?

A. No, sir, I don't.

Q. You never asked Cavness if the sport shirt was his or somebody else's, did you?

A. When I started to question him down at the vice room, he told me that he didn't want to answer any question.

Q. I am talking about his home. You never asked him? A. No, sir.

Q. And yet you stated that every officer was instructed to report to you? A. That's right.

Q. And to search under your direction?

A. Before we left Mr. Cavness' home, I told Mr. Cavness that I was going to take him down to the vice squad office and question him in regards to all the evidence that was found in his house and premises. [153]

Q. And they all came to the vice squad and told you, I found this over there, I found this over there, I found this over there, is that right?

A. Well, whenever they found anything they called me, and Mr. Cavness was right there.

Q. All the time?

A. Well, that's my instructions to them, that whenever they found any evidence——

Q. But actually it didn't happen that way, did it?

A. Really happened that way, yes, sir.

Q. It really happened that way?

(Testimony of William K. Wells.)

A. Yes, sir.

Q. And Cavness was present whenever each officer found something and reported to you the findings?

A. I mean if they found anything, Mr. Cavness was not around, they were to call me and I'd take Mr. Cavness and show him exactly where.

Q. So that Mr. Cavness was not with any officer when each one went around searching the house, was he?

A. Only, well, he was in the back room when Officer Pestano found the inhaler tube.

Q. And where were you?

A. I was right near there. I think I was standing by the door there leading to the kitchen.

Q. And all this time Cavness had a towel and was [154] wiping his mouth and trying to stop his bleeding, both from his mouth and head?

A. I don't think he was bleeding.

Q. It stopped by that time?

A. I am quite sure.

Q. Later on you took him to the emergency hospital yourself?

A. No, sir, I didn't.

Q. One of the other officers under your instructions? . . . A. Yes, sir.

The Court: We will take our recess for the afternoon.

(A recess was taken at 3:00 p.m.)

(Testimony of William K. Wells.)

After Recess

The Court: You may continue, the Jury being present as well as the Defendant.

By Mr. Miho:

Q. Mr. Wells, yesterday you spoke something about having talked to Gerry Wilson, this informer, seven or eight times.

A. About that many times.

Q. And when was the last time that you talked to her before the search warrant was issued on July 12th, I believe that was issued?

A. On the 12th of July.

Q. When was the last time? That was the last time? A. Last time. [155]

Q. She was in your office at the time?

A. You mean the last time I talked to her prior to leaving the Territory?

Q. No, prior to the day you got the search warrant, the last time.

A. On the afternoon of the 12th. That's right. July 12th. Yes, sir.

Q. And when was the search warrant prepared?

A. It was prepared that morning.

Q. That morning? A. Typed out.

Q. Are you sure of that?

A. Well, it could have been about, I think it was around ten o'clock, ten or eleven.

Q. That morning? A. Yes, sir.

Q. July 12th? A. That's right.

(Testimony of William K. Wells.)

Q. When was the last time you talked to her prior to that time?

A. It could have been at least three or four days or two days prior to that.

Q. You don't know for sure?

A. Not sure what day.

Q. How did it happen that you were present when she [156] left the Territory? Did you want to make sure that she left the Territory?

Mr. Hoddick: I object to the question and also to any further questions by Mr. Miho concerning Gerry Wilson as not being proper cross-examination.

Mr. Miho: Testing his credibility.

Mr. Hoddick: It doesn't go to his credibility at all. It wasn't the subject of the cross-examination.

The Court: Direct examination.

Mr. Miho: Yes, I will check my records.

The Court: Well, anyway I have allowed you on that basis on cross-examination to ask these other questions. I will allow this one.

Mr. Miho: Will you answer it, please?

The Witness: May I have that again?

(The reporter read the last question.)

A. No, sir. I was down to the airport on an investigation.

Q. You just happened to run into her?

A. Just happened to see her walking towards the plane.

The Court: Mr. Wells,—may I interrupt?—you

(Testimony of William K. Wells.)

came to me this afternoon before court and stated you wanted to make a correction in your testimony?

The Witness: Well, your Honor, that wasn't brought out.

The Court: But you came to me? [157]

The Witness: Yes, sir.

The Court: What was it?

The Witness: The correction on the search warrant. Instead of the buy being on July 10, 1947, it was on July 7.

Mr. Miho: What happened on the 7th?

The Witness: The buy was made on July 7th instead of July 10th.

Mr. Hoddick: At least as to the information you received?

The Witness: No, sir. On the buy the informer made from the Defendant Cavness.

Mr. Miho: You mean the purchase that she allegedly made at the Defendant's home?

The Witness: That's right.

Mr. Miho: You wish to change that from the 10th to the 7th?

The Witness: That's right.

The Court: Wait a minute. Let's make sure you understand what he is saying. As I understand him, the affidavit and the search warrant recite the date of the alleged purchase by the informer as having been July 10th, 1949.

The Witness: 1949.

The Court: And Mr. Wells may also have testi-

(Testimony of William K. Wells.)

fied to that. But if he did, both his testimony and the affidavit [158] and search warrant are incorrect as to the date. He is now correcting the date to reflect that actually it occurred on July 7th.

The Witness: Seventh.

Mr. Hoddick: For purposes of making this correction fully, that is based on what she told you? You weren't there when she made the purchase on the 7th or the alleged purchase?

The Witness: No, sir. She told us it was made on the 7th.

Mr. Hoddick: All right.

The Witness: When it was typed out I overlooked the thing. Going over the report thoroughly this noon before I came over here I caught it. I immediately came over and told the Judge.

Q. (By Mr. Miho): Tell us how you caught it?

A. And I referred you to Mr. Hoddick. Going over the report thoroughly.

Q. Where is the report? Is it available in your office or in your person, on your person?

A. Yes, sir.

Q. Would you show it to us?

A. Just the part of the report, your Honor, or the whole report?

The Court: He is asking you a question. [159]

Mr. Hoddick: I object. I don't think Mr. Miho has any right or privilege to see the investigative report of this case. This is a confidential matter

(Testimony of William K. Wells.)

between Mr. Wells and the Government, in addition to which the report would be hearsay anyway.

The Court: What is the purpose?

Mr. Miho: Your Honor please, he is coming here on a very material point which is the basis of the search warrant, and an affidavit sworn to before a U. S. Commissioner and sworn to under oath that she, this affiant, Gerry Wilson made, did assert things on a certain date. That is under oath and it is presumed to be made under oath and therefore made correctly. Now, for Mr. Wells to come in, and he has also stated that he has prepared this himself, for him to come in at this stage when the Defendant is on trial and state from a certain report that he has that he caught it this noon, that that is an error, certainly I am entitled, your Honor please, under our laws to go into the facts, factual background as to how he happened to come to make such an error and to come to such a correct one, inasmuch as the record states that Gerry Wilson is not here herself to tell us the truth one way or the other.

The Court: The error is the important thing.

Mr. Hoddick: I don't think there is even a showing of any error, your Honor. There is a mere assumption from [160] Mr. Wells' report that she did not make a purchase on the 10th. On the other hand Mrs. Wilson signed an affidavit that she did.

The Court: You may on cross-examination delve into it to full extent, but on the present basis I see

(Testimony of William K. Wells.)

no occasion on the strength of it, or on the face of the objection made, to demand that the witness produce his investigative report. The important thing is that there is an error which he has freely admitted. How it came about, and so forth, you certainly can inquire into. At this stage I am not going to make him produce his report. I may later if it develops. But right at this point I can't see it.

Mr. Miho: May I note an exception, your Honor?

The Court: You certainly may.

Q. (By Mr. Miho): Whom did you discuss this case with since you took the stand yesterday, if anyone?

A. Mr. Hoddick.

Q. And who else?

A. That's all.

Q. You didn't talk to your other fellow officers?

A. No, sir.

Q. Not at all?

A. I talked to one of them but not the case. I was down with him at the police station for two hours to obtain [161] at least 40 pictures on another investigation, yes, sir.

The Court: You came in to see me this noon or rather at 1:30?

The Witness: Yes, sir. And I first caught it on my diary when I went back on my diary.

Q. You prepared that affidavit that Gerry Wilson signed, didn't you?

A. I prepared it in longhand and I had at least other affidavits on that same date.

(Testimony of William K. Wells.)

Q. But you prepared it in longhand?

A. In longhand. And then my clerk typed it when I asked her. She said she put it down exactly. So I myself made the error.

Q. And you also prepared the search warrant, didn't you? A. Yes, sir.

Q. And that also has the same date?

A. Same date, yes, sir.

Q. And in your 28 years' experience you know how important dates are, especially when you are accusing somebody of having sold something illegally to someone else, is that right?

A. Yes, sir.

Q. You know how important the dates are?

A. Very important. I made an error. [162]

Mr. Hoddick: Your Honor, he is arguing with the witness.

The Court: Go ahead.

Q. (By Mr. Miho): Since you took the stand yesterday—— A. Yes, sir.

Q. ——you remember when you first took the stand yesterday, Mr. Hoddick asked you about this search warrant or I asked you about it and the dates came up many, many times, July 12th, July 10th, July 19th, July 22nd, do you remember?

A. Yes, sir.

Q. You didn't catch it then, did you?

A. No, sir.

Q. You had to go and check your reports and records?

(Testimony of William K. Wells.)

A. No, sir, I caught it when I checked my diary.

Q. Well, couldn't your diary also be mistaken? You are absolutely certain?

A. When I checked the diary and checked other forms—I mean I found she made the purchase on the 7th.

Q. You weren't there, were you?

A. No, sir.

Q. What entry in your diary stated that she made the purchase on the 7th? What in your diary stated that?

A. That I received the evidence from Officer Theodore Kinney.

Q. What evidence? [163]

A. The capsules. I mean the cocaine.

Mr. Miho: I move that that answer be stricken.

Mr. Hoddick: I object, your Honor. The witness answered the question that was asked him by Defense Counsel.

Mr. Miho: It is not responsive.

The Court: Actually the most the witness can say is that he believed it to be that. Whether it is or not is a chemical question. The Jury is so instructed.

Q. (By Mr. Miho): Anyway, you got some instructions from Officer Kinney, is that what you are trying to say? A. Yes, sir.

Q. That a certain party made a certain purchase? A. Yes, sir.

(Testimony of William K. Wells.)

Q. And that was on what date?

A. On July 7th.

Q. July 7th? And you put that down in a diary on July 7th; you put that down in a diary on July 7th?

A. Yes, sir.

Q. Do you keep a daily diary, Mr. Wells?

A. I do.

Q. In your office, your home, or where?

A. In my office.

Q. Your office is an open office?

A. What do you mean? [164]

Q. It is not like a strong room, your office?

A. No, sir.

Q. Anyone can walk in?

A. No, sir. We close the files every night. It is locked up.

Q. So that your diary is kept in a locked room, locked portion of your room?

A. Yes, sir.

Q. So that other people cannot see it? But you keep a diary, a daily diary?

A. Yes.

Q. Of anything, of everything important?

A. Well, everything that I remember.

Q. What else did you put in the diary about Gerry Wilson?

Mr. Hoddick: I will object to that question, your Honor. It doesn't have anything at all to do with this case.

The Court: What relevancy has that to the error?

Mr. Miho: I will withdraw that. I thought it

(Testimony of William K. Wells.)

was very material to this point because he stated that Gerry Wilson has made a mistake in her statement to him.

The Court: His testimony is that he made the mistake. Now, you can probe into how he made it and why he made it, and so forth, and the effect of it to your heart's content, but let's stick to that.

Q. And the first time you came across this error from July up to the time of this trial, the first time you came across and caught this error was today at noon? A. Yes, sir.

Q. And prior to that time what was prepared by you as to the date July 10th you thought it was the correct date? A. Yes, sir.

Q. Now, before you came, before this case came on for trial, you had many, many, in fact, almost daily conversations with your brother officers who were involved in this case, is that right?

A. Before——

Q. Before we started this case.

A. I think we just had a conference with Mr. Hoddick once and on another occasion.

Q. I am talking about your brother officers, Sousa, Whitford, Sasaki, Pestano and all the others, nine of the others. You were hanging around with them almost every day, weren't you? You did, anyway? A. Every night I am out with them.

Q. Every night you are out with them?

A. With Officer Sousa, Lieutenant Botelho, and maybe with Officer Marcotte, and Shaffer.

(Testimony of William K. Wells.)

Q. And you say you never discussed it except once, this case, with them? [166]

A. Oh, I thought you meant with the District Attorney.

Q. I said——

A. We discussed it on numerous occasions.

Q. Numerous occasions? A. Yes, sir.

Q. And, in fact, before you start a case you go over everything that the case is going to be tried on? You go over the evidence with not only Mr. Hoddick but you yourself review everything, don't you? A. That's right.

Q. And in your preparation for any case a date is all important, dates of events are all important, are they not? A. Yes, sir.

Q. And from your 28 years' experience you know how important and the reason of its importance, do you not? A. Yes, sir.

Q. Now, will you explain to us how it was that you happened to make this mistake from the 7th to the 10th, the two papers?

A. I can't tell you how the mistake was made. When I wrote it out in longhand I had the girl type it. And I asked her prior to coming here if the mistake was made by her and she said she typed down exactly what I wrote in my longhand. So I must have been the one that made the error.

Q. Yes, but you put it at that time down from some [167] other evidence or some other piece of paper that you have, didn't you?

(Testimony of William K. Wells.)

A. I had so much to do that day, Mr. Miho, and I just made the mistake.

Q. May I ask you, have you ever in your 28 years' experience as an officer made a similar mistake? A. The first one.

Q. This is your first one?

A. First one, and I am very, very sorry about it. And I immediately came over here to see the Judge and——

Q. Now, you were present, you told me, when Gerry Wilson came to your office and she read this affidavit that you prepared? A. Yes, sir.

Q. And you were present when she testified under oath before Judge Steiner when you got the search warrant on the strength of that affidavit of Gerry Wilson? A. Yes, sir.

Q. Right? A. Yes, sir.

Q. And you must have read the affidavit word for word before she signed it?

A. Before she signed that she—we also went over two other search warrants.

Q. I asked you a simple question. [168]

The Court: Answer the question, Mr. Wells. Read it.

(The reporter read the last question.)

A. Yes, sir.

Q. It wasn't one of those blank affidavits that sometimes I understand people sign because they are busy?

(Testimony of William K. Wells.)

Mr. Hoddick: I object.

A. I don't sign any blank affidavits.

Mr. Miho: It is a very clear question, if your Honor please. I have every right to ask him that.

Mr. Hoddick: This is not proper cross-examination. The subject is the making of the affidavit by Gerry Wilson, or anything else pertaining to the formulation of the search warrant. It was not gone into on direct examination. The search warrant will speak for itself.

The Court: Well, this bears on the error. But there is confusion here. Mr. Wells didn't sign the affidavit. He may have, as he said, read it before somebody else signed it. But you have got the thing twisted in your question there to the effect, to the inference that he signed the affidavit. Let's keep it straight as to who is doing what and why.

Mr. Hoddick: Your Honor, even on the question of error I don't think it is the proper subject for examination at this time. There is no——

The Court: Maybe it isn't, but your objection is overruled. Go ahead. [169]

Mr. Miho: Would you answer the question?

The Court: Let's get the question clear. I don't understand it.

Mr. Miho: I will reframe it.

The Court: Please.

Q. You prepared the affidavit that Gerry Wilson signed? A. Yes, sir.

Q. You prepared the search warrant that Judge Steiner signed? A. Yes, sir.

(Testimony of William K. Wells.)

Q. Gerry Wilson was in your office before she signed anything? A. Right.

Q. And before she signed, before she signed this affidavit upon which the search warrant was based, you must have read that affidavit word for word.

A. I told her to read it and she read it and she said, "It's O.K."

Q. Well, did you yourself read it?

A. I read it, yes, sir.

Q. And then you asked her to read it?

A. Yes, sir.

The Court: Did you read it before it was signed or after?

The Witness: I read it, your Honor, immediately after [170] the girl got through typing it.

Q. Where did she sign that affidavit, in your office?

A. Right from, in my office, yes, sir.

Q. And that was before Judge Steiner came?

A. No, sir, she signed it in the presence of Judge Steiner. He is the U. S. Commissioner.

Q. And then the warrant was signed at the same time by Judge Steiner?

A. Yes, sir. She signed the affidavit first.

Q. Did she also read or did you give her an opportunity to read the search warrant?

A. I gave her the search warrant, the affidavit and search warrant to read, yes, sir.

Q. And you saw her actually read it?

A. Yes, sir.

(Testimony of William K. Wells.)

Q. She didn't just casually glance at it?

A. Well, she read it. I handed it to her and asked her—what do you call it?—to read the affidavit and search warrant.

Q. Did you inform her that if anything in that affidavit was false that she could be sued for damages?

A. At that time?

Q. Yes. Or at any time?

A. When she—prior to her making the buy I told her—what do you call?—that if she would make a buy, we will say, [171] from Mr. Cavness, that is to be so, that is to be from Mr. Cavness or where, from his premises or the barbershop down on Smith Street——

Q. Do you know, Mr. Wells, that anyone who signs a false affidavit not only commits perjury but can be sued for damages?

Mr. Hoddick: Objection, your Honor. Mr. Wells is hardly qualified to state what the law is.

The Court: Sustained.

Q. (By Mr. Miho): In any event, Mr. Wells, you knew how important an affidavit was?

A. Yes.

Q. You knew how important the dates were?

A. Yes, sir.

Q. And yet you say that out of a blank for some reason because you were busy or something you put a wrong date on the affidavit?

A. Evidently it was my error.

Q. You don't know how that error came about?

A. No, sir, I don't.

(Testimony of William K. Wells.)

Q. You have no explanation?

A. No explanation, no, sir.

Q. And this affidavit was made how many days after the alleged purchase that Gerry Wilson made of any narcotics? [172] I will use the word "narcotics," which she states she bought from Cavness. How many days?

A. That affidavit was made on the morning of the 12th.

Q. So if she made a purchase, as you now state, on the 7th——

A. Yes, sir.

Q. ——it was five days or so?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And you had talked to her at least twice before the 12th? A. Yes, sir.

Q. And prior to that last two times you had talked to her seven or eight times?

A. Yes, sir.

Q. Within a space of a few weeks?

A. About that time.

Q. Why was it necessary to talk to her so often, nine or ten times in the space of three or four weeks before she finally signed something?

A. We weren't talking to her only about your Defendant Cavness.

Q. Mr. Wells, may I ask you this question: for some reason you stated yesterday you wanted to get something on [173] Cavness; you said that. Right?

A. By that, I wanted to get something.

(Testimony of William K. Wells.)

Q. Get some evidence on him? You said something like that?

A. Yes, after I received prior information on what your Defendant was doing.

Q. Yes. So you wanted to get something on him?

A. Well, that's my work.

Q. And you kept this place under observation since June of this year—right?

A. Yes, sir, off and on.

Q. And you couldn't get anything on him, is that right? As good an officer as you were, you couldn't get anything on him up to July the 12th—right?

A. Well, we got a buy off him through the informer.

Q. Mr. Wells, would you please just stick to the question? You couldn't get anything on him from June up to July?

A. What do you mean by "get anything on him"?

Q. Anything to stick him with, as you people call it.

A. Well, we didn't arrest him prior to that.

Q. Well, anyway, how many months was it that you kept this place under observation?

A. I would say a couple of months.

Q. A couple of months? Finally you got hold of an [174] informer?

A. I didn't get hold of an informer. It was a police informer.

(Testimony of William K. Wells.)

Q. Somebody gave you an informer?

A. Didn't give it to me.

Q. Somebody told you about an informer?

A. They called me in to question the informer in regards to different suspects in town.

Q. How many suspects did you talk to during this nine or ten times that you had been conversing with Miss Gerry Wilson? How many other suspects were on your list that you wanted to get information on besides Cavness?

Mr. Hoddick: We seem to be going pretty far afield.

Mr. Miho: On his recollection of the errors, to explain how it came about if he had 10 or 12 or 15 other defendants that he was trying to question——

Mr. Hoddick: We are not trying to question 10 or 15.

The Court: You say it is relevant to the error?

Mr. Miho: Yes, your Honor please.

The Court: All right. I can't follow it. I can't quite follow it, but go ahead. You understand the question?

Q. You cannot answer that question, can you?

A. I am thinking how many suspects I questioned here——

Q. If you brought your diary into court, and any other reports you have during that two-month period, you wouldn't [175] have more than two or three at the most of suspects that you were work-

(Testimony of William K. Wells.)

ing on at that time, on narcotics, is that right?

A. We were working on the big ones at that time.

Q. But not more than two or three?

A. The big ones. I think a little more than that, maybe.

Q. So that it wasn't the number of suspects that got you side-tracked on the dates, is that right?

A. I just made an error. How I made it I don't recall how.

Q. Do you have any kind of a report on the conversations or interviews you had with this Gerry Wilson as to Cavness? A. No, sir.

Q. You don't have any notations in the diary?

A. No, sir.

Q. You don't? Well, didn't you just state that you have the date 7th in your diary and that is where you found your error?

A. Yes, sir. Just a purchase. But I don't put down in my diary what conversation she or information she gives me about Mr. Cavness.

Q. What did you put down on the 7th?

A. Received the evidence from Sergeant Kinney, purchase [176] made from Mr. Cavness.

Q. You did not in any way check the truth or veracity or credibility of this informer of yours at any time, did you, the reliability of her statement or charges to Kinney or yourself at any time, did you?

A. I found out a few days after I talked, when I first talked to her, that she knew a lot about the different suspects.

(Testimony of William K. Wells.)

Q. But she knew hardly anything about Cavness?
A. She knew a lot about Cavness.

Q. She knew? Did you?
A. Yes, sir.

Q. Did she testify whether she actually knew Cavness at any time by taking her in front of Cavness' barber shop or any place where he hangs out?

Mr. Hoddick: This is apaprently aside from the line of error, and I think it is an improper question.

The Court: What is the relevancy of that?

Mr. Miho: I will withdraw the question. That's all, your Honor.

The Court: Redirect?

Mr. Hoddick: No redirect, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: Next witness. [177]

Mr. Hoddick: Mr. Shaffer, please.

Mr. Miho: If your Honor please, at this time while we are waiting, may I be permitted to add further grounds to the written motion that we have so far filed; the further grounds on the incorrectness of the dates charged in the affidavit and in the search warrant, your Honor.

The Court: Yes.

Mr. Hoddick: May it please the Court, I would object to that amendment, those amended grounds. There is no showing that that is an incorrect date. If you will examine the affidavit, it states that she made a purchahse on July 10th; that she also madé

purchases during June and in July. Now, she may have made another purchase on July 7th. That Mr. Wells testified to.

The Court: We will argue that when we come to it. But he wishes to add that as a ground of his motion to suppress. It may be added and we will argue it when, as and if we come to it.

PAUL SHAFFER,

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: Paul Shaffer. [178]

The Court: Age?

The Witness: Thirty-three.

The Court: Residence?

The Witness: House 137, New Mill Camp Aiea.

The Court: Occupation?

The Witness: Police Officer, Honolulu Police Department.

The Court: And you are a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

(Testimony of Paul Shaffer.)

By Mr. Hoddick:

Q. Mr. Shaffer, how long have you been with the Honolulu Police Department?

A. Since the latter part of 1941.

Q. And what division, to what division of the Police Department are you attached?

A. At present I am assigned to the vice division.

Q. And how long have you been assigned to the vice division?

A. Since about June.

Q. This year?

A. Yes, sir.

Q. I call your attention to July 19, 1949, and ask if you assisted Mr. Wells in any of his work on that date? [179]

A. Yes, sir, I did.

Q. And what was the locale in which you rendered this assistance? Where did you render this assistance to Mr. Wells?

A. That was down in Waikiki area on Leahi Avenue.

Q. Do you remember the address?

A. I believe it was 3811.

Q. Will you describe in your own words what occurred when you first went to Mr. Wells' assistance and what was involved?

A. You mean from the beginning, from the beginning?

Q. That's right.

A. Well, that day——

Q. Just state things that you know of your own knowledge.

(Testimony of Paul Shaffer.)

A. Yes, sir. That day I was working under Sergeant Sousa and under Captain Whitford, who is captain of the vice division. And my orders then were to go along with Sergeant Sousa and Captain Whitford and Mr. Wells on that date; we went down to the Waikiki Fire Station in the afternoon, and from there we went to Officer Abbey's house. We stayed at Officer Abbey's house from—from his parlor, from his front room we could look across the street and see Cavness' house from that location. We sat there and waited, and it was about 2:45 a taxi cab drew up to Mr. Cavness' house, whose [180] address I believe the number is 3811, and a woman got out of the taxi cab and went into Cavness' house. The woman was identified by Sergeant Sousa as Mary Ryan. She stayed in there and later on she came out, got into the taxi; then the taxi drove back towards Honolulu. Then later on Cavness and a colored lady came out of the house and walked out of the yard and Cavness then looked in his mail box, stood around and went back into the house, and the colored lady walked away down the street. She was walking towards the Koko Head side. Then Cavness got in his car and drove away from his address. That was about approximately five, I'd say it was around 5:40. Cavness drove back to his address and drove in the driveway.

Q. Mr. Shaffer, before you go any further there, to the best of your recollection what officers were in Abbey's house with you? Who was there with you?

(Testimony of Paul Shaffer.)

A. There was Captain Whitford, Sergeant Sousa, Sergeant Sasaki, myself, and Officer Abbey and Mr. Wells.

Q. Go ahead. Pardon the interruption.

A. When Cavness drove back into his driveway, Mr. Wells proceeded on, and the information I had at the time was that he had a warrant for Mr. Cavness on a narcotics charge. So Mr. Wells walked across to where Cavness was seated behind the steering wheel of his car, and Sergeant Sousa was directly, was after Mr. Wells, and the door was open when I last saw it. And I could see Mr. Wells approach Cavness, and it appeared to me that he was talking to him.

Mr. Miho: He was what?

A. Talking to Cavness. At this time my instructions were then to approach there and give any assistance if it was needed. So I ran across the street and dove through this hedge that is in front of Mr. Cavness' place.

Mr. Miho: Speak a little louder, please.

Mr. Hoddick: He wants you to speak a little louder.

A. I dove through the hedge. It is a sort of like a mock orange hedge. And landed in the front lawn of Cavness' house, and when I came up I saw this struggle going on between Mr. Wells and Cavness and Captain Whitford and Sergeant Sousa. So I jumped in and tried to help subdue Cavness. So this struggle, we just couldn't do very much

(Testimony of Paul Shaffer.)

about it. I mean we were trying to hold him and Mr. Wells yelled that he had it in his hand. So I was on the back of Cavness trying to put a choke hold on him, but I just couldn't apply it. He was too wiry. And everybody was trying to hold him down. He was just throwing us off. So he went down half way and then he had his right hand up to his mouth, and the shout then went up, "He is trying to swallow it." So then I tried more then to hang on to him, but he was throwing us around. And this struggle was taking place on the grass there. So finally he had his hand up to his mouth and you [182] could hear a cracking sound like he was chewing on something. We tried to grab his arm and finally we got him; we just piled on to him and his hand went out and when his hand went out I saw something. I could see some sort of color in his hand. He had some object in his hand, and then there was pieces that fell from the vicinity of his hand down towards the ground.

Q. What was the color of those pieces?

A. They appeared to be white.

Q. Large?

A. No, not too large. It happened just in a matter of a fraction of a second. Very hard to see exactly what it was. All I could see, it was just something fell. So then we finally got him down on his, laying down on his face, and were hanging on to him, and Officer Abbey forced his hand open and Captain Whitford got a piece of Vicks inhaler

(Testimony of Paul Shaffer.)

tube out of his hand. And then we put the handcuffs on him and got him to his feet, and Cavness wanted to go into the house and Mr. Wells and we took him into the house. Then a call went out that they found something out in the lawn.

Mr. Miho: Who said that?

A. I believe it was Officer Abbey. I don't know. They called for Mr. Wells. So we went out and Officer Abbey had a piece of Vicks inhaler tube that looked like capsules or pills what they were fastened to it. So I began looking [183] around in the grass in the same vicinity where the struggle took place and I found some of these capsules, too. They looked like pills or had white stuff inside of them. I also found some pieces of the white pieces of this Vicks inhaler tube. So after I found those I called Mr. Wells over and he said, "Possible narcotics." And I kept them until we returned to the police station where I turned them over to him. After we found these articles we went back into the house and conducted a complete and thorough search of the whole house. And in the bathroom Officer Marcotte by that time was at the scene; going through the bathroom there he found some empty capsules, gelatine capsules.

Mr. Miho: Your Honor, I object to it unless a better foundation is laid.

The Court: Just a minute. You can only testify as to what you know of your own knowledge. That testimony just given about what Officer Marcotte

(Testimony of Paul Shaffer.)

did or found in the house on this occasion is stricken. Pick it up. As a matter of fact, it is about one minute to four. I think we will stop here for the day and pick it up at nine o'clock in the morning.

(The Court adjourned at 4:00 p.m.) [184]

December 8, 1949

(The Court convened at 9:00 a.m.)

The Clerk: Criminal No. 10,256, United States of America versus Orestus Cavness, for further trial.

The Court: Are the parties ready?

Mr. Miho: We are ready for the Defendant.

Mr. Hoddick: Ready for the Plaintiff.

The Court: Note the presence of the Jury and of the Defendant.

PAUL SHAFFER

a witness on behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

Direct Examination

(Continued)

The Court: Mr. Shaffer, you are the same Mr. Shaffer who heretofore has testified under oath in this case?

The Witness: Yes, sir.

(Testimony of Paul Shaffer.)

The Court: I remind you that you are still under oath. You may continue.

By Mr. Hoddick:

Q. Mr. Shaffer, yesterday on direct examination you had related I think the finding of six capsules.

Mr. Miho: Your Honor please, I object to that. As far as my recollection goes, there is nothing in the record of his [185] finding anything.

The Court: That doesn't ring a bell in my memory either.

Mr. Hoddick: Perhaps I jumped ahead of the story.

Q. Mr. Shaffer, you were recounting what took place at 3811 Leahi Avenue on July 19, 1949. And now will you take up your story from the time that Mr. Cavness, Captain Whitford and Mr. Wells and I think some other officers went into the house? I believe you stayed outside.

The Court: I don't think that's very good either.

Q. Mr. Shaffer, will you take it up from the point where Mr. Cavness went into the house after the struggle?

A. After the struggle where Cavness was finally subdued and handcuffed, he requested to be taken into the house. Mr. Wells and myself took him inside and he sat on a chair, and while we were in there a shout went up outside that there was something found. Mr. Wells was summoned to come

(Testimony of Paul Shaffer.)

outside. I believe it was Officer Abbey. When we went out, Officer Abbey had in his hand a broken portion of what appeared to be part of a Vicks inhaler and adhered to the inside of that were two pills or capsules with some white substance inside which was assumed to be——

Mr. Miho: Just a moment. I move that any answer as to his opinion as to what it might be or what it might not be, that the witness be instructed not to state.

The Court: Very well. Unless you know actually what [186] it was, we are not interested in what you thought it was.

A. (Continuing): It was white, something white inside. I didn't take it apart or fooled around with it. It was shown to Mr. Wells and then Officer Abbey instructed by Mr. Wells to hold it. At the same time I began looking around the lawn and I found some of these pills and some broken pieces——

Q. Mr. Shaffer, what was the condition of the lawn where you made your search?

A. It was mowed. It was a level stretch of lawn, grass, and it was well-kept. It was in good condition. There was nothing else there where I found these pills or capsules with the white stuff inside of them, which I showed to Mr. Wells, and he in turn instructed me to keep them. Then when we returned to the police station they were turned over to him.

(Testimony of Paul Shaffer.)

Q. Mr. Shaffer, were these capsules scattered over a wide area?

A. Well, they seemed to be in an area—it wasn't too wide. I'd say it was approximately an area of about four feet square. After those things were found we went into the house, began searching the house. That's when Officer Marcotte came across a box of these empty pills. I saw them in his hand.

Mr. Miho: Just a moment, if your Honor please. Unless [187] a better proper foundation is laid, I move that answer be stricken as to what somebody else found.

The Court: He said he saw it.

Mr. Hoddick: I believe, your Honor, that is the point where we were yesterday.

The Court: It may go out. Let's clear it up so that there would be no ambiguity about it. The Jury is instructed to disregard that last answer.

Q. (By Mr. Hoddick): Mr. Shaffer, when you searched the house, did you make the search in anyone else's company?

A. Well, we were all working together.

Q. Did you make a search of the bathroom?

A. I was inside the bathroom.

Q. And who was there with you?

A. Officer Marcotte was in there.

Q. And both you and Marcotte were searching the bathroom? A. Yes.

Q. Now, did Officer Marcotte pick up anything in the bathroom?

(Testimony of Paul Shaffer.)

A. I saw he had a box of these empty pills, capsules, whatever they are.

Q. And did you see where he picked them up?

A. I didn't see him pick them up. [188]

Q. You just saw him there with a box of empty capsules? A. Yes.

Q. Well, proceed with your narrative. What happened next?

A. The search continued on. We were all over. I crawled up in the loft of the house and I didn't find anything else. Then we were in the back room and Officer Pestano was going through the clothes in the closet there and he pulled his hand out of one of the coats and there was an empty Vicks inhaler in his hand when he pulled it out of the coat. And he called Mr. Wells' attention to that. And he received the same instructions from Mr. Wells, to hang on to it until we got to the police station.

Q. Did he open up that Vicks inhaler in your presence?

A. Yes, but there was nothing inside of it.

Q. Will you describe the condition of the Vicks inhaler?

A. When you unscrew the base, that portion that has Vicks in it, that was missing. It was sort of like a stem. That was broken off of it. It was just a base and all it was was an empty tube.

Q. Proceed. What happened after that?

A. Well, after the search then we went back to

(Testimony of Paul Shaffer.)

the police station. I turned my evidence over to Mr. Wells.

Q. Now, from the time that you found these six capsules on the grass where the struggle had taken place to the time [189] that you turned them over to Mr. Wells, did you make any alterations in the capsules?

A. No, sir, I didn't fool with them at all.

Q. Any substitutions? A. No, sir.

Q. They were in the same condition as when you found them? A. Yes, sir.

Q. You say you went down to the police station?

A. Yes, sir.

Q. What happened down there?

A. I turned the evidence over and then kept on working. We had other work to do.

Mr. Hoddick: May I have just a moment of the Court's time?

The Court: Yes.

Mr. Hoddick: No further questions.

The Court: Cross-examination?

Cross-Examination

By Mr. Miho:

Q. Officer Shaffer, before you went to this house across the Defendant's house on Leahi Avenue and went into Officer Abbey's house across the street, who accompanied you?

The Court: I don't understand what that question means. Before he went into what house? [190]

(Testimony of Paul Shaffer.)

Mr. Miho: I will reframe the question.

Q. At the time you first went into Officer Abbey's house, when you first went there, who were with you?

A. As I went into Officer Abbey's house, is that what you mean?

Q. I will reframe it. Who and who were with you in Officer Abbey's house?

A. Inside of Officer Abbey's house?

Q. Yes, I said inside.

A. There was Mr. Wells, Officer Abbey, Sergeant Sousa, Sergeant Sasaki and myself.

Q. And where did you five first get together?

A. We had, we met at the Waikiki Fire Station. That's the one there on the Ala Wai and Kapahulu.

Q. And when you say "we", whom do you mean?

A. I was under instruction of Captain Whitford.

Q. Who else was there besides the five you named?

A. Well, Captain Whitford was also in the house, Officer Abbey's house, with us.

Q. You didn't mention Captain Whitford up to now, have you?

A. I did before when I gave my statement.

Q. But then Captain Whitford was actually with you in Officer Abbey's house?

A. Yes, he was. [191]

Q. And not at the Waikiki Fire Station?

A. And at the Waikiki Fire Station.

(Testimony of Paul Shaffer.)

Q. Well, when did Captain Whitford join you, if that is what you mean?

A. I was instructed to report to the vice office. That's where I first met Captain Whitford prior to going to the Waikiki Fire Station.

A. Answer the question. Did you understand my question? I asked you, when did Captain Whitford join you at Officer Abbey's house? Do you want that more clear?

A. Join me? I don't get that. He was inside the house when I entered the house.

Q. Who else was already in the house when you entered the house? Officer Abbey's house.

A. Mr. Wells.

Q. Who else? Was Roberts there?

A. Who?

Q. Officer Roberts.

A. Roberts? You mean Oliver Roberts?

Q. Yes.

Q. Yes. A. No, I didn't see him there.

Q. All right. Go on, if you can recall who else was there, already there in Officer Abbey's house when you went there?

A. I am trying to recollect. We made two trips. I [192] believe Sergeant Sousa was there, too.

Q. How about Officer Marcotte?

A. No, he wasn't there.

The Court: Speak louder.

A. He wasn't there.

Q. I want to get the names of the officers who

(Testimony of Paul Shaffer.)

were in Officer Abbey's house that you know of immediately prior to Mr. Wells leaving the house to raid the Defendant's home.

A. Immediately prior to the raid there was Mr. Wells, Captain Whitford, Sergeant Sousa, Sergeant Sasaki, Officer Abbey, and myself.

Q. Now, do you know who joined you about the time you reached the Defendant's house, you yourself reached that house, who joined you?

A. I didn't get into the Defendant's house until——

Q. Premises, the yard, let's say.

A. When I went into the premises Mr. Wells was there and Sergeant Sousa, Captain Whitford, and I suppose Officer Abbey and Sergeant Sasaki, and at the premises after I did; I didn't see them come on into the premises. I was already engaged in the struggle.

Q. Can you tell us whether all of the six officers you named, including yourself, left Officer Abbey's house about the same time? A. Yes. [193]

Q. You all left the same time?

A. Approximately the same time.

Q. And your arrangement, your plan, was to have Mr. Wells go to the Defendant first?

A. I don't know what the arrangement was. I just had my instructions to follow.

Q. To follow who?

A. I had my instructions from Captain Whitford that I was supposed to follow.

(Testimony of Paul Shaffer.)

Q. What were your instructions?

A. To assist Mr. Wells in serving a warrant.

Q. In serving the warrant? What else?

A. And then to assist in the search.

Q. What else? What other specific instructions did you have from Captain Whitford?

A. To be on the lookout for narcotics while conducting the search.

Q. By the way, do you know anyone by the name of Gerry Wilson?

Mr. Hoddick: Objection, as improper cross-examination.

Mr. Miho: Your Honor please, we have gone into Gerry Wilson and the statement is from Mr. Wells that Gerry Wilson is a vice squad personality, that he got this Gerry Wilson through the help of this vice squad.

The Court: This witness has not been questioned about [194] this person.

Mr. Miho: I will withdraw the question.

Q. In the course of your duties, Officer Shaffer, you came into contact with Mr. Wells quite often, is that right?

A. I met him since I have been in the vice division. I didn't know the gentleman prior to that time.

Q. And how long had you been assigned to help Mr. Wells so far as the Defendant Cavness was concerned?

A. Just that afternoon that we conducted the raid down there.

(Testimony of Paul Shaffer.)

Q. And Mr. Wells asked you and the others in the vice squad for help to try to get something on this Defendant some time prior to that?

A. I don't recall anything like that.

Q. So that the only time you discussed the Defendant Cavness at any time in your life with Mr. Wells was on the day of the raid?

A. As far as I recall, I believe so.

Q. Now, are you sure that the officers who preceded you into the Defendant's yard were Mr. Wells first—are you sure of that?

A. I am positive of that. Mr. Wells was first into the premises. He was the first one that approached Cavness.

Q. And Sousa was behind him or Abbey behind him? A. Sousa was in the rear of him. [195]

Q. And where was Abbey, behind Sousa?

A. I didn't—I don't recall the exact position at that time where Abbey was.

Q. But he was pretty close to Sousa and Wells, isn't that right? A. That I couldn't say.

Q. You couldn't say?

A. Because I was going through the hedge.

Q. And Officer Sasaki, what was his position?

A. At the time I went through the hedge, I believe, he was in the rear of me.

Q. Rear of you? A. I believe so.

Q. Well, who was in the front, who altogether were in the front of you?

A. As I told you before, Mr. Wells approached

(Testimony of Paul Shaffer.)

Cavness and Sousa was in the rear of Mr. Wells, and at that time I went through the hedge into the premises.

Q. Well, didn't you just state that there was somebody else who was with Mr. Wells ahead of you? Didn't you state that after Sousa was Whitford, Captain Whitford, your own superior officer, didn't you just say that? A. Just now?

Q. Yes, just now, just a few seconds ago, in answer to my question. [196]

A. I said Captain Whitford was in the house prior to the raid.

Mr. Miho: Mr. Reporter, will you please read that part of the question.

(The Reporter read the question and answer referred to.)

Q. You mentioned Whitford there as preceding, soon after Sousa, is that right?

A. I mentioned that Whitford was with Sousa and Mr. Wells when I was on the premises. When we approached them the struggle was already in progress.

Q. Well, I will ask you again. I want to get the picture of who was there ahead of you. You speak of struggle and all that. Now, you entered the premises at a certain time during this whole encounter, the yard of the Defendant. You entered there at a certain stage in this whole process?

A. Yes.

(Testimony of Paul Shaffer.)

Q. Now, when you entered the yard, the Defendant's yard, as you say, you dove through the hedge there; just before you dove through the hedge, through the Defendant's hedge, who was ahead of you besides Mr. Wells and Mr. Sousa?

A. Nobody ahead of me when I went through the hedge.

Q. You mean Mr. Wells wasn't there either and Mr. Sousa wasn't there either?

A. In the process of going right through the hedge I couldn't see anything but hedge in front of me. [197]

Q. I don't want to hedge the question and waste a lot of time, Mr. Shaffer. You stated you all left the house about the same time, Officer Abbey's house, didn't you?

A. Yes, approximately the same time.

Q. I am asking you a simple question. After you left Officer Abbey's house to raid the Defendant's premises, who preceded you into the Defendant's premises? That's all I am asking.

A. I told you that Mr. Wells went first. Sergeant Sousa was in the rear of him.

Q. Yes?

A. Captain Whitford was over to my side, to my left. Now, whether he was inside the premises at that time I don't know. I was going through the hedge.

Q. Will you come down to the blackboard there and tell me which side of that hedge you dove through, as you stated yesterday?

(Testimony of Paul Shaffer.)

The Court: Can you orient yourself to any of those diagrams? Explain the diagram.

Mr. Miho: This is the garage. I mean this is the yard, and this is the makai; here is the garage.

Mr. Hoddick: Excuse me. That is Mr. Miho's drawing.

Mr. Miho: Well, you can make your own drawing.

The Court: Well, the point is that you were the one that labelled that as a garage. Prior witnesses have not. [198] You are interested in the hedge. Show him the hedge.

A. This is the front of the house. This is the hedge. Here is the driveway into the house. This is the hedge. This is the hedge. (Indicating on blackboard.)

Q. Will you state, put a mark there where you dove through the hedge?

A. Approximately in this area. It may be a few feet either side. It was in that area there on the Kaimuki side of the driveway (Writing on blackboard.)

Q. I see. And from there, after you dove through the hedge—by the way, how tall are you, Officer Shaffer? A. About six feet.

Q. How many pounds do you weigh?

A. Right now I weigh about 195.

Q. Did you weigh about that weight at the time of the raid, about the same weight?

A. Approximately the same, maybe a little less.

(Testimony of Paul Shaffer.)

Q. Are you a football player or a former football player? A. I played football.

Q. So you know what it means when you say you dive? A. Went head first.

Q. You went head first in there? A. Yes.

Q. And then after you went in there head first, what [199] did you do next immediately after that, from that point on, from that "S" point that you marked, what did you do?

A. Well, I went through the hedge and I landed on my feet inside.

Q. Oh, you didn't touch your hands or anything? A. No.

Q. But you did put your head down, is that right?

A. I leaped, just went right through it.

Q. Right through it? Did you tear your clothes?

A. No.

Q. Your suit on just like that?

A. Oh, no.

Q. Similar?

A. I was wearing my uniform.

Q. Or did you have your raiding costume like jungle fighters?

The Court: What?

Mr. Miho: Jungle fighter. I understand the vice squad has some uniforms like that.

Q. What kind of a uniform did you have on that day on this raid?

A. At that time I was wearing old clothes.

(Testimony of Paul Shaffer.)

Q. Old clothes? A. Yes.

Q By "old clothes", that you vice squad people use [200] when you go out on any raid, is that right? Dungarees?

A. I didn't get the first part of your question.

Q. When you say "old clothes," that's the clothes that you wear that are made out of materials such as the soldiers used in jungle training, similar clothes? That's what you mean?

A. I don't know. I buy all my clothes in the stores over here. There is nothing similar between them and jungle training outfits. I don't quite understand what you mean.

Q. All right. I will withdraw the question. You had old clothes on? A. Yes.

Q. The clothes weren't torn, though—right?

A. I didn't examine them at that time.

Q. You still got your clothes that you wore on that day?

The Court: Wait a minute. You mean before he went through the hedge or after, were they torn?

Mr. Miho: After going through the hedge, your Honor. A. I didn't notice it.

Q. Well, you stated just a moment ago, just a few seconds ago, that your clothes weren't torn, didn't you?

A. I said that they weren't torn, that I noticed.

Q. Then I asked you again and you said, no, I don't know, I didn't notice it, is that right? [201]

A. Well, I didn't feel any draft in my trousers

(Testimony of Paul Shaffer.)

and my shirt was still on me. So apparently they weren't torn.

Q. I see. After you dove through and landed on your feet through this orange, mock orange hedge, what did you do next from that point?

A. I looked towards the location where I last saw Mr. Wells and I saw they were struggling with Cavness.

Q. On which side of the house?

A. According to your diagram this would be in the driveway area.

Q. Makai-Koko Head?

A. Well, it would be towards Waikiki.

Q. Towards your left?

A. Yes, towards my left.

Q. You landed on your feet so you stood up, is that right? A. Yes.

Q. You stood up and you stood there and took a look at the situation, is that what you did?

A. I didn't stand there. I was moving.

Q. Where did you move to?

A. In the direction where I last saw Mr. Wells and Sergeant Sousa.

Q. What did you have to do to get there?

A. I ran. [202]

Q. You ran? A. That's right.

Q. And when you got there to the scene, what was going on?

A. They were trying to hold Cavness.

Q. Who do you mean by "they"?

(Testimony of Paul Shaffer.)

A. Mr. Wells, Sergeant Sousa, and Captain Whitford was there at that time.

Q. Where was Sasaki? A. I don't know.

Q. Where was Abbey?

A. I don't know at that exact moment. I don't know where they were.

Q. You didn't see them?

A. No, because I jumped on him.

Q. Then throughout the entire encounter, from the moment you joined the struggle, up to the moment Cavness was finally subdued, you don't know anything about Abbey, Officer Abbey or Officer Sasaki then?

A. No, they came into the struggle after I got into it.

Q. After you got into it? A. Yes.

Q. And what were they doing?

A. They were trying to help us subdue him.

Q. Now, after, from the moment you entered into the struggle, you were right there at the scene, is that right? You were right there? You never moved away until after the Defendant was subdued, is that right? A. I was right there.

Q. Until he was subdued? A. Yes.

Q. And would you remember if anyone struck, blackjacked Cavness on the back of his head or not, or did you see such a thing, such an awful thing?

A. I don't recall anything like that.

Q. Would you be able to deny that anyone blackjacked him on the back of his head?

(Testimony of Paul Shaffer.)

A. I don't recall anybody using that.

Q. I asked you, would you deny it here under oath that somebody blackjacked him on the back of his head? Would you deny it?

A. What do you mean "deny"?

Q. How long have you been an officer, Mr. Shaffer?

A. Quite a while.

Q. How many times have you appeared as a witness in court?

A. Not too often. This is the first time I have been in this Court.

Q. I asked you, how many times you appeared as a witness [204] in any court? I didn't say the Federal Court.

A. I never counted.

Q. It's been over two dozen times, hasn't it, at least, or maybe three dozen?

A. I don't know.

Q. Innumerable times, haven't you appeared as a witness in court?

A. Yes, innumerable times but I wasn't going by dozens.

Q. You have seen me before you as an attorney innumerable times, haven't you; many, many times, haven't you?

A. I think I did see you.

Q. And you still say you don't understand the question I asked you, whether you would deny under oath that a certain thing happened, that you don't understand that question?

A. I don't recall seeing——

The Court: No, wait a minute. That wasn't your

(Testimony of Paul Shaffer.)

question. The question was, You wouldn't deny that it did happen? Not that it did happen. You have got your question twisted.

Mr. Miho: I will ask him again.

The Court: You ask him again.

Q. Officer Shaffer, I am trying to make it as simple as possible. Will you deny that someone blackjacked Cavness on the back of his head?

A. I don't——

Mr. Hoddick: Pardon me. He is not competent to answer [205] that question.

The Court: Overruled. Go ahead.

A. I don't recall seeing, recall him being blackjacked.

Q. Was he blackjacked? Was the Defendant Cavness blackjacked by anyone?

A. I don't recall. I don't remember if he was or not.

Q. Will you deny here under oath that someone blackbacked Cavness on some part of his body?

A. I don't recall if they did or not.

Q. Then he might have been blackjacked, is that what you are trying to say?

A. I don't know if he was or not.

Q. He might have been?

A. I don't recall.

Q. You don't recall? But you were right there?

A. Yes.

Q. Is that right? A. Yes, that's right.

Q. You saw Cavness bleeding on the back of his head, you wouldn't deny that?

(Testimony of Paul Shaffer.)

A. Oh, there was blood on him.

Q. You know he was bleeding from his mouth, too, don't you?

A. Yes, his lip was cut. But I assume that that was done when he was biting that capsule. [206]

Q. Oh, trying to swallow it at the same time?

A. I don't know what he was trying to do.

Q. Who was it that had given him the choke hold that you or someone spoke of the other day?

A. I tried to get one on him but it didn't work.

Q. Did he swallow something?

A. He was trying to put something in his mouth, whatever he had in his right hand.

Q. So you were choking his throat?

A. I was trying to get it but I couldn't apply it properly. He was squirming around.

Q. By the way, did you have jiu jitsu training as a police officer?

A. A little of it. I never amounted to much as a jiu jitsu wrestler.

Q. Were you a wrestler at the same time?

A. No, never much.

Q. Have you been a prize fighter or amateur boxer in the prize ring?

A. No, never was.

Q. But you were trying to choke him with your arm, as you indicated?

A. Yes.

Q. And Cavness was trying to bite something in his mouth? [207]

A. Well, there was a gnashing of his teeth, and he had this thing in his mouth when I heard it;

(Testimony of Paul Shaffer.)

he had his hand in his mouth when I heard that.

Q. What hand? A. His right hand.

Q. Will you come here, Cavness? Then he had it like this, is that right, as you indicated? (Demonstrating with the Defendant.) He had it in his right hand; he was gnashing it, as you indicated, on the right side of his lip?

A. I didn't indicate on the right side. He had his hand to his mouth. Now, whether it was this side or that side, I was in the back of him applying, attempting to apply a hold on him.

Q. Oh, that is another part you don't recall, is that right? A. Recall what?

Q. What part of his mouth he was trying to bite it with, is that right?

A. I can't very well see his mouth from the back of his head.

Q. Well, you saw his right hand, didn't you? You made a motion.

A. The right hand was up like that. (Indicating.)

Q. Cavness put your hand to the mouth, is that the way it was? (To the Defendant.) Cavness, put your hand to [208] your mouth. Is that the way it was? A. I couldn't tell.

Q. You were in the back of him—right?

A. Yes.

Q. All right. Was it this way or not? (Demonstrating with Defendant.)

Mr. Hoddick: Turn him around, Mr. Miho. Maybe he can tell better.

(Testimony of Paul Shaffer.)

Q. (By Mr. Miho): Is that the way it was?

A. It's hard to tell. He was half-crouched and there was a bunch of other fellows on him at the same time. His hand was in the vicinity of his mouth in the front. I can't tell.

Q. Well, I will ask you, Officer Shaffer, was he trying to bite an object in his right hand and on the lefthand side of his mouth, is that what he was trying to do?

A. I don't think his hand was like that.

Q. Wasn't like that? Then it must have been on the other side, is that right?

A. No, it could have been in the middle.

Q. Oh, in the middle? A. Yes.

Q. In the middle? Put it in the middle there.

A. You see, he wasn't holding his hand steady at the [209] time.

Q. I see. And that was when he was on his knee?

A. His head down and he was in motion all the time, struggling.

Q. At that time he was bleeding already on the back of his head, is that right? Do you remember that?

A. I noticed after the struggle that there was blood, but at what time in the struggle that thing started to bleed I don't know.

Q. Do you remember a pool of blood on the ground there when you went to search for your evidence? Do you remember that?

(Testimony of Paul Shaffer.)

A. I didn't see any blood.

Q. You didn't see any blood? You didn't see any blood on the ground there, on the freshly-mowed lawn, ground, you didn't see any blood on the ground?

A. I don't recall.

Q. Would you deny that there was blood on the ground there; that if someone took the stand here under oath and said that there was blood on the ground, that he would be mistaken, would you say that?

A. I couldn't answer it that way. I don't recall now if there was blood on the grass. I know he had it on himself.

Q. But you found some pills you said, didn't you? [210]

A. Oh, yes, I remember that.

Q. How big are those pills? Indicate with your fingers. (Witness indicates.) One-eighth of an inch?

A. I don't know. I didn't measure them. Regular size.

Q. About the size of a small pea?

A. No, a little bigger than a small pea.

Q. Middle-sized pea?

A. I'd say a large-sized pea in an oblong shape.

Q. You found six of those on the ground?

A. Yes.

Q. But you didn't see a pool of blood, is that right?

A. I wasn't looking for blood.

Q. Oh, I see. And you are not sure whether at the time you put a choke hold or tried to grab hold

(Testimony of Paul Shaffer.)

of Cavness, as you indicated, whether he was already bleeding at that time or not, you don't recall?

A. I don't recall the exact instance he began to bleed.

Q. If he was bleeding, you would remember, wouldn't you, because you were in the back of him and your face would probably just about touch his blood with your face?

A. I had blood on my face. I guess I did touch him.

Q. So he must have been bleeding at that time?

A. He probably was.

Q. On the back of his head? [211]

A. I don't know where.

Q. Well, did you have blood on your hand from his mouth? You recall whether you had any blood on your hand from his mouth or not?

A. No, I don't recall.

Q. You don't recall? Did you have any blood on your hand at any time, on your hand?

A. I didn't get that question.

Q. Did you at any time notice any blood on your hand?

A. There could have been blood. I don't exactly recall. I know I washed my hands after the raid was done.

Q. You went into the house, the first thing you did was to wash your hands, one of the first things you did? A. We what?

Q. When you went into Cavness' house you washed your hands, is that right?

(Testimony of Paul Shaffer.)

A. No, I didn't wash them there.

Q. Where did you wash them?

A. At the police station.

Q. And the reason you washed it, you don't know whether it was because there was blood on your hands or not? You don't recall that? You don't recall that, like a lot of other things, you don't recall that part?

A. No, I don't. It could have been dirt. I mean, routing around the lawn there. [212]

Q. Did you have any blood on your clothes?

A. Yes, I had some on my shirt.

Q. The front of your shirt?

A. Yes. I think it was little bit on my back.

Q. Now, I just want to ask you this question as simply as possible, Officer Shaffer: Did you see Cavness hit his head on any object such as, any object other than a human object?

A. Well, I couldn't frankly say because the struggle began on the left side of the car. And coming alongside the car, we finally ended up on the law. It is possible he could have hit the car, I guess.

Q. So, so far as you know—I am not asking you of something that you didn't see or were not in a position to see—do you remember, Officer Shaffer, talking to Cavness; you were pretty kind and solicitous to Cavness after you all went into the house and took Cavness in and you were asking him how he felt and how was the bleeding and all that? Do you remember all that?

(Testimony of Paul Shaffer.)

A. No, I don't recall that.

Q. You recall talking to him in the bathroom, to Cavness in the bathroom, don't you? You took him into the house, you said?

A. With Mr. Wells.

Q. Yes. Don't you remember taking him into the bathroom [213] and talking to him in the bathroom? You don't recall that?

A. I don't recall taking him into the bathroom.

Q. Do you recall talking to him in the bathroom soon after you entered into the house, or is it one of those things you don't recall?

A. Maybe I did speak to him. I don't recall exactly if I did or not.

Q. You might have?

A. I could have spoken to him in the bathroom.

Q. Maybe I will remind you of something. Then you might remember. Do you remember telling him, "Cavness, I think you hit your head on a bumper of the car." And that's how he got hurt. Now, do you remember?

A. I don't remember saying anything like that.

Q. Would you deny that you said that to Cavness in his bathroom, "Cavness, you hit your head on a bumper, and that's how I think you got hurt on the back of your head?"

A. I don't recall saying anything like that. I don't even recall being in the bathroom.

Q. I am asking you. Might you have said such a thing? A. I couldn't recall.

(Testimony of Paul Shaffer.)

Q. It is a very simple question, Mr. Shaffer. You could have said such a thing? You might have said such a thing, is that right? You might have made such a statement to Cavness, isn't that right?

A. I may have. I don't recall. I might have. I don't recall.

Mr. Miho: Your Honor please, could he be instructed to answer the question, your Honor? It is a simple question. He said, "I don't recall." He is just trying to keep away from answering my simple question, your Honor please. I am merely asking him, "Couldn't you——"

The Court: It doesn't require a yes or no answer. He can answer as best he can. It depends on his recollection, as to whether he thinks he might have said so or not.

Q. Could you? A. What?

Q. You might have made such a statement to Cavness?

A. As I said, I don't recollect whether I did or not.

Q. But you recollect now that you were with Cavness in the bathrom and talked to him?

A. No, I don't recollect that.

Q. You don't recollect being in the bathroom with Cavness or talking to the Defendant Cavness in the bathroom at all? You don't recollect that at all?

A. No, I don't. The only thing I can remember about the bathroom is when Officer Marcotte had those pills in his hand.

(Testimony of Paul Shaffer.)

Q. In other words, you were concentrating so much on finding something that you forgot everything else, is that [215] what you are trying to tell us?

A. Well, I was very—I mean performing my duties in regards to the search.

Q. You took Cavness to the emergency hospital, didn't you, or you recall that?

A. I believe I did. I don't—

Q. You are not so sure of that either, is that right? You are not so sure of that, because you stated to Mr. Hoddick that you went directly to the police station to give your evidence to Mr. Wells?

A. I didn't say I went directly to the police station. I said I went to the police station.

Q. From the Defendant's home, is that right?

A. Yes, but I didn't say direct.

Q. So I am giving you a chance to correct your story. Did you or didn't you take Cavness to the emergency hospital from the house over there? You don't remember that?

A. Well, I was riding in the car. I think we did stop there.

Q. But you are not sure? You are not sure, is that what you are trying to tell us, whether you took the Defendant who was bleeding to the emergency hospital or not, just a few months ago, you don't remember whether you took him to the emergency hospital or not, is that what you are trying to tell us? [216]

The Court: Answer the question.

(Testimony of Paul Shaffer.)

A. No, I could have taken him up there.

Q. Why don't you state that you took him to the emergency hospital, Officer Shaffer, as an honorable officer should, to give us the whole truth of this thing? Didn't Officer Marcotte drive the car and you and Roberts got in the car and took Cavness to the emergency hospital? Why don't you give us a clear answer to this thing and on every question?

The Court: Let's have one question at a time, not six. One question at a time. Now, what is the question?

Q. Officer Shaffer, you went on a car, in a car that was driven by Officer Marcotte, do you remember that? A. Yes, I recall that.

Q. Officer Roberts was with you and Marcotte, do you remember that?

A. I don't know if Roberts was in there.

Q. Do you still not recall that you took him to the hospital?

A. Yes, I recall now Marcotte was driving the car and we did stop at the emergency.

Q. What did you tell the Defendant on the way to the hospital?

A. I don't even recall speaking to the Defendant on the way to the hospital.

Q. You didn't talk to him about how he got hurt, fell [217] down and got hurt?

A. I don't recall talking to him about that. As a matter of fact, I think he was sitting in the rear of the car.

(Testimony of Paul Shaffer.)

Q. He had a towel in his hand, didn't he?

A. I don't know what he had in his hands.

Q. You don't recall those details? Go on. What did you talk——

A. After he was in the hospital, after we stopped there, it wasn't too long; then we went down to the station.

Q. You don't remember telling him repeatedly in a nice way that you have that he must have gotten hurt by falling down and hitting some object, you don't remember that?

A. I don't recall.

Q. You don't recall?

A. I don't recall making any conversation with him at all. I know I spoke to him several times but what the conversation was, I don't think was more than some of the things he was directing us in the house. I recall when we were searching——

Q. You spoke something about not seeing anyone blackjack the Defendant, is that right?

A. I don't recall.

Q. You stated, though, that you wouldn't deny that someone might have, or am I mistaken on that?

A. What was that?

Q. Someone might have blackjacked him, is that right?

A. Someone might have blackjacked him?

Q. Yes. A. I don't know.

Q. You don't know? Were you there when Officer Abbey was struggling with the Defendant?

(Testimony of Paul Shaffer.)

A. Yes.

Q. What was Officer Abbey doing?

A. Forcing the Defendant's hand open.

Q. With what?

A. I believe he had an object in his hand.

Q. You don't know what it was, though?

A. I don't know whether it was a blackjack or something similar to it. I don't know. But the instruction was to open his hand and we had to use force to do it.

Q. Open his hand—who was it that casually said, I think he's got it in his hand? Do you remember such a statement that you made yesterday?

A. Somebody said, he's got it in his hand; watch his hand.

Q. Didn't you say that, if I am correct in my recollection, didn't you say that Mr. Wells stated that he's got it, that I think he's got it in his hand?

A. If you check back I don't think the word "think" [219] was in there.

Q. You are pretty sure of what you said yesterday? What did you say?

A. If I remember correctly, according to the record, Mr. Wells said, "Watch his hand, his right hand; he got it in his right hand."

Q. Did Mr. Wells say anything about his left hand? A. I don't know about that.

Q. And which hand was it that Officer Abbey was trying to open, right or left hand?

A. Right hand.

(Testimony of Paul Shaffer.)

Q. The right hand? Are you sure of that?

A. Yes.

Q. You saw that yourself? A. Yes.

Q. Right in front of you? A. Yes.

Q. So if anyone else were to say that Officer Abbey was trying to open his left hand, he would be mistaken and not you, is that right?

A. It was a hand sticking out on my right.

Q. You remember anyone stepping on Cavness' hands, right or left, stepping on any of his hands, either of his hands? A. Stepping on them?

Q. Yes, stepping on them like that. (Indicating.)

A. Oh, you mean stamping on them?

Q. Either standing on them or pressing it slowly, one of the two, which is it?

A. Officer Abbey was forcing his hand. He had to strike his hand to try to force it open.

Q. With an object? A. Yes.

Q. You didn't see anyone step on the Defendant's hand, then? A. No, I don't recall that.

Q. You don't recall that?

A. No. Somebody stepped on me. I had a bruise in my back the next day.

Q. Oh. Did you go to a masseur? A. No.

Q. And so you don't remmeber anyone stepping on Cavness's hands, you don't recall?

A. I don't recollect that, no.

Q. Now, after Officer Abbey—you were right there when Officer Abbey was trying to open his left or did you say the right hand? Right hand?

(Testimony of Paul Shaffer.)

A. Yes.

Q. Are you sure of that? A. Yes. [221]

Q. When Officer Abbey was trying to open his right hand, the Defendant's right hand, it did open, didn't it? A. The hand?

Q. Yes.

A. Yes, it opened. Captain Whitford took the broken inhaler tube out of his hand.

Q. He took it right then and there, Captain Whitford, is that right? A. That's right.

Q. You didn't say that to Mr. Hoddick in his direct examination, did you? A. Yes, I did.

Q. That he took it after Abbey opened his right hand or left hand?

A. I stated that Captain Whitford took the inhaler tube from his hand.

Q. Are you sure of that? A. Yes.

Q. And then what did Captain Whitford do or say?

A. That's when I was still hanging on to him.

Q. Why didn't Captain Whitford present that or call Mr Wells' attention to what he found during the struggle immediately after the struggle was over, do you remember? A. I believe——

Q. Do you remember why that happened? [222]

A. I believe Mr. Wells saw that himself.

Q. Oh, saw that himself? You were able to see what Mr. Wells was able to see, is that right? Is that what you are trying to tell us?

A. What?

(Testimony of Paul Shaffer.)

Q. You were in a position to be able to see what Mr. Wells was able to see, is that right?

A. That's what I saw. I don't know what Mr. Wells saw.

Q. Didn't you just state that you believed that Mr. Wells saw that himself?

A. I said it is possible that Mr. Wells saw it, too.

Q. That is not one of those things you don't recollect, then? You recollect that Mr. Wells saw something?

A. I don't quite get that.

Q. Never mind. Then after he was subdued, you all went into the house. All right.

The Court: Before we go into the house, let's take our first recess.

(A recess was taken at 10 a.m.)

After Recess

The Court: Note the presence of the Jury and the Defendant. You may continue.

By Mr. Miho:

Q. Mr. Shaffer, didn't you state yesterday on the [223] direct examination by Mr. Hoddick that Abbey forced—I am trying to recall the exact words that you used—that Abbey forced the Defendant's hand open and picked up some pieces of Vicks inhaler?

A. I didn't say that.

Q. Didn't you say that yesterday?

A. Not all at one time.

Q. Not all in one sentence?

A. No.

(Testimony of Paul Shaffer.)

Q. You deny that you said that in one sentence?

A. That's right.

Q. You deny that? If you said it, it would be an error? It was not the truth?

A. It is not the way I meant it to be said.

Q. Meant it to be said? What you meant to be said was what you said today, is that what you are trying to tell us?

A. I think if you will check the record, I stated that Abbey forced his hand open. And then, after we were in the house, Abbey found a piece of the Vicks inhaler tube.

Q. You didn't say——

A. I think that's the way it is.

Q. You didn't say anything about Whitford picking anything out of the Defendant's hand?

A. Yes, I said that, yes. Captain Whitford recovered a tube from his hand. [224]

Q. From the Defendant's hand? A. Yes.

Q. In any event, what you are trying to say is that that is what actually happened, that Whitford got a piece of an inhaler tube out of the Defendant's hand? A. Yes.

Q. That is the truth?

A. To the best of my knowledge, it is.

Q. You saw that yourself with your own eyes?

A. Yes.

Q. And what did Abbey pick up, if anything?

A. Abbey found a piece of inhaler tube, a piece of it that had these two pills stuck to it.

(Testimony of Paul Shaffer.)

Q. Out of the Defendant's hand?

A. No, he found that—apparently I wasn't there—he said that he found it on the ground.

Q. So far as you know, you never saw Abbey pick up anything from your direct, own knowledge?

A. If I saw him pick up anything?

Q. Yes.

A. What do you mean "pick up anything"?

Q. Well, pick up. Let's see. Pick up something. That's what I mean.

A. No, I don't. I couldn't exactly say. He was assisting in the search and he picked up quite a few things. [225]

Q. Abbey did? A. Yes.

Q. Abbey picked up?

A. He picked up something, moved it over here, look, put it back.

Q. And you were right there?

A. Well, that was inside the house.

Q. We are still outside, Mr. Shaffer.

A. Oh. I didn't actually see Abbey—I saw him have it in his hands, this small particle with the two pills.

Q. But you didn't see him pick up anything, is that right? A. No.

Q. Is that right? A. I don't believe I did.

Q. But you saw him force Cavness' hand open, that you saw? A. Yes.

Q. He had something in his, Cavness had something in his right hand?

(Testimony of Paul Shaffer.)

A. He had his fist closed.

Q. And Abbey opened it? A. Yes.

Q. And Cavness opened his hand and with it picked up something from his hand? [226]

A. Yes.

Q. And what was that that Whitford picked up?

A. Similar to that.

Q. Something like this? A. Yes.

The Court: Speak louder, please.

Mr. Hoddick: May the record show that it was similar to a Vicks inhaler tube.

The Court: Is that correct?

Mr. Miho: Yes, your Honor.

The Court: All right.

Mr. Miho: Would you have any objection to this being introduced in evidence?

Mr. Hoddick: No objection. Do it on your own case, though.

Mr. Miho: There is no rule that says I cannot introduce it at any time.

The Court: You can't introduce evidence on cross-examination without permission.

Mr. Miho: Of the Court.

The Court: You are faced with an objection.

Mr. Miho: I will withhold it, then. Mr. Hoddick, would you have any objection if I kept on using this to try to make the story more clear?

Mr. Hoddick: No, if you, in phrasing your question, [227] will refer to it as a Vicks inhaler tube, so there won't be any question.

(Testimony of Paul Shaffer.)

Q. (By Mr. Miho): From this top part—is this the top part? A. A Vicks tube.

Q. That's what you mean by the tube? Try not to mumble your words, Mr. Shaffer.

A. This is part of the tube. There's another part that fits in here.

Q. Is that this part here? A. Yes.

Q. And which is the part that Cavness had in his hand?

A. About that much of it. (Indicating.)

Q. Which is the part that he had? Did he have the whole thing in his hand?

A. Well, it was broken. This top part here was broken. And all he had was what was left of it.

Q. I see. So he had, excepting for the top portion—indicating the top portion of this Vicks inhaler—except for the top portion which was broken, Cavness had his hand, had in his hand the rest of that Vicks inhaler, is that what you are trying to say, in his hand? A. Yes.

Q. That would be the screw-in part and the cover, is that right? [228] A. Yes.

Q. And it was screwed in like this?

A. Oh, yes, it was all together.

Q. All together? A. But, Mr. Miho,—

Q. Yes?

A. —when I saw the tube later on, this part here was cut off; this here wasn't there at all.

Q. Later on? A. After I saw the tube.

Q. When later on did you acquire that knowledge?

(Testimony of Paul Shaffer.)

A. Well, I saw that tube afterwards when Captain Whitford had it in his hands looking at it.

Q. In that portion that was broken off——

A. You could see in the end of it.

Q. And where was it?

A. Captain Whitford had it in his hand.

Q. At the scene? A. Yes.

Q. How much of the inner portion was left?
You mark it with a pencil.

A. I didn't see any of it. It was only the base of it.

Q. It was only the base?

A. I didn't see this part here.

Q. Well, how did the base stick to this without the [229] screw portion?

A. It had the threads on here.

Q. The thread was on?

A. Apparently so, because this part was in there. I didn't examine it. I just could see the broken end of it.

Q. Is that the portion you don't recall, whether that thread portion was on or not? You don't recall that? A. I didn't check the thread.

Q. You saw it, didn't you? You saw it twice, didn't you, or three times?

A. Together like that.

Q. It was together? That you are sure of?

A. This end was broken off. You could see inside. Nothing was in it.

Q. But it was together, you are sure?

A. Yes.

(Testimony of Paul Shaffer.)

Q. Both at the scene and at the police station?

A. Police station, I don't recall if I looked at it then.

Q. You don't recall?

A. At the police station I turned my evidence in and I left.

Q. But you are sure that it was just as it is here excepting for the top portion which was broken off?

A. It was broken off and seemed to be broken at an [230] angle.

Q. At an angle?

A. Yes, it wasn't cut off sharp.

Q. Broken off? A. Shattered.

Q. You didn't see the broken off portions on the scene of the struggle? You didn't see the broken off part at the scene of the struggle at any time yourself? A. The broken off part?

Q. Or what could be the broken off part. Did you yourself see it at the scene of the struggle at any time? A. Yes, I found four pieces of it.

Q. And when was that?

A. At the same time I found those pills, the six pills on the grass. And then there was small pieces of what appeared to be part of that. I picked those up, too.

Q. At the scene? A. Yes.

Q. Now, indicate over here, tell me if I am correct—I will indicate. This is the two coconut trees. You remember that? (Referring to diagram on blackboard.) A. I remember one of them.

(Testimony of Paul Shaffer.)

Q. You remember this one? A. Yes.

Q. Now, with relation to the coconut tree and the driveway here, about where did you pick up the pieces you speak of?

A. May I go down there? (Referring to black-board.)

The Court: Yes.

A. This is the automobile here.

Q. Yes.

A. It was approximately in this area around here.

Q. Put a clear mark on there, "A" with a circle. (Witness writes on board.) You didn't see the blood at the same time you picked up——

A. I don't recall seeing the blood.

Q. Now, Officer Shaffer, didn't you see someone hit Cavness' head? A. I don't recollect.

Q. You don't recollect? A. No.

Q. How many times did you see Cavness fall or stumble? A. I didn't count.

Q. Was it as many times as that——

A. Well, it was during the course of the struggle, he was half down and half up and was just throwing us around like we were a couple of bags of potatoes.

Q. You have served search warrants before, haven't you? A. No, I haven't. [232]

Q. Oh, you have been with someone who served search warrants before?

A. Yes, I was on a couple of raids where they had warrants.

(Testimony of Paul Shaffer.)

Q. If you were in charge of this particular operation, would you have needed nine men to help you serve a search warrant to search a house?

Mr. Hoddick: Objection, your Honor. This witness is hardly qualified to pass as an expert on raiding parties or as to how many men would have been needed. I think the question is immaterial anyway as to whehter nine men are needed or not.

The Court: There is no foundation for it. He hasn't been qualified as one who has conducted a search. He simply said that he has been on prior raids where they had warrants. But I don't recall that he had ever been in charge so as to be in the category of an expert.

Q. (By Mr. Miho): Have you ever made raids in which you were in charge?

A. I don't recall ever making a raid where I was solely in charge. I assisted on raids.

Q. Well, in those raids that you assisted did you raid one person? I mean place where one person was present or many persons were present?

A. It was more than one person. [233]

Q. More than one person? And what was the number of policemen who accompanied you in that particular raid? A. Sometimes 20, 25.

Q. How many people were alleged to be there?

A. Well, it all depends. Sometimes five or six; sometimes 250. I am talking about gambling raids there, chicken fights, where you have numerous persons.

(Testimony of Paul Shaffer.)

Q. But have you ever assisted in a raid in which you knew beforehand that only one person was staying at this particular house wherein you used more than two persons, two officers?

A. Yes. We had a Filipino who went crazy with a knife. We used about eight fellows then.

Q. Outside of that? A. I don't recall.

Q. Just to make it clear in the record, Mr. Shaffer, so far as you know, you know of no one who hit Cavness on his head or on his face?

A. I don't recall that.

Q. You don't recall that? Do you recall the bruises and the swellings and the marks on Cavness' face other than the portion on his lips which was cut?

A. I don't recollect seeing his face swollen. I remember he had a cut on his lip. I don't recall which side it was, but he did have a cut there. [234]

Q. Do you recall whether the inside of his lips were also cut and bleeding or not?

A. I didn't examine him.

Q. You didn't?

A. I didn't look inside his mouth.

Q. All you know is that it was the outside?

A. For all I could see was just blood in the area. I didn't even look to see how bad it was cut.

Q. Do you recall that his mouth was full of blood, his teeth were colored red from the bleeding? Do you recall that? A. I don't recall that.

Q. Do you remember his shirt with blood on it?

(Testimony of Paul Shaffer.)

A. Yes, I believe he did have blood on his shirt.

Q. Is this the shirt he had on that day, do you recall? Take a good look at it, both the front and the back.

A. It is possible that this was the shirt he wore.

Q. Did your shirt have as much blood on it as this shirt seems to indicate?

Mr. Hoddick: Objection. It calls for a conclusion on the part of the witness that there is blood on the shirt, that there was blood on the witness' shirt.

Mr. Miho: He stated there was blood on the witness' shirt.

The Court: Well, also he said that it seems to be the [235] shirt.

Mr. Miho: I will reframe the question.

Q. Did your shirt have more blood on it than the Defendant's blood, do you recall?

A. My shirt have more than his?

Q. Yes. A. I didn't compare it.

Q. Well, give us a guess. Give us a human guess.

A. Well, I couldn't even begin to guess. I'd have to compare his shirt with mine and actually find out.

Q. How much blood did you have on your shirt? All the front was bloody?

A. No, I don't believe so.

Q. You didn't keep that shirt by any chance?

A. Oh, yes. It is a good shirt. I couldn't afford to throw it away.

(Testimony of Paul Shaffer.)

Q. You washed it and laundered it, I suppose?

A. Oh, yes, numerous times.

Q. When did Roberts come into the scene, Officer Roberts come into the picture?

A. Roberts, Pestano and Officer Marcotte, they arrived at the scene I believe when we already began to search the house. I don't know the exact time they came in. But they assisted in the search of the house. I know that.

Q. About how many minutes elapsed do you think from the [236] time the struggle was over to the time that these officers joined you?

A. Oh, a few minutes. I didn't time it. I don't know exactly how many minutes. I say approximately, I'd say about five minutes.

Q. But not more than five minutes?

A. It could be more. It could be less. I said approximately five minutes. That's my judgment of time.

Q. With relation to the search of the house, did they join you just as you began to search the house or not?

A. I don't know if they joined us when we started to search because I was already on my own. I began my work. Then as I began searching then I became conscious of the fact that these other officers were around there.

Q. Who handcuffed Cavness?

A. Who had what?

(Testimony of Paul Shaffer.)

Q. If you were in charge of this particular operation, would you have needed nine men to help you serve a search warrant to search a house?

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Q. Who handcuffed Cavness?

A. Who had what?

(Testimony of Paul Shaffer.)

The Court: Handcuffed Cavness. Who handcuffed Cavness, the Defendant?

A. I don't recall exactly who done it. I know we all had to assist in handcuffing him.

Q. Assist in handcuffing him? Are you sure that Marcotte, Roberts—and who was the other one?—and Sasaki, Roberts, Pestano and Marcotte, these three officers joined you after the struggle was over? Are you sure of that? A. I am fairly sure.

Q. Then I ask you again, do you remember who the Defendant was handcuffed to? Who was he handcuffed to? I will reframe the question. A while ago you stated that somebody handcuffed the Defendant, is that right, after he was subdued?

A. Yes, we had to handcuff him.

Q. He was struggling so much, is that right?

A. That's right.

Q. And throwing you around like a bag of rice, you say? A. All of us.

Q. All nine of you? A. That's right.

Q. I see. Well, then, Marcotte must have been there if all nine of you were there, is that right?

A. Wait a minute. The initial officers, the first ones that went in there, I don't know how many, I didn't count; Captain Whitford, Mr. Wells, Sergeant Sousa, Sergeant Sasaki, myself and Officer Abbey; there were seven of us, that is, six of us.

Q. Don't you remember Officer Abbey handcuffing this Defendant to Office Marcotte?

A. I don't recall that.

(Testimony of Paul Shaffer.)

Q. Would you deny that?

A. I don't even recall him being handcuffed to anybody.

Q. You don't recall that?

A. Because after he was quited down I believe the [238] handcuffs were taken off of him, if I recall correctly.

Q. Where? Outside? A. In the house.

Q. In the house? For what purpose?

A. Well, he behaved himself.

Q. He wanted to wash himself and take care of his bleeding, didn't he? Isn't that what, isn't that why his handcuffs were taken off?

A. I don't know if that was why. I didn't have anything to do with that part.

Q. What's that?

A. I didn't have anything to say or have the authortiy to have him, to have the handcuffs taken off of him.

Q. Isn't that when you walked into the bathroom with him and started to talk to him and tried to be a little kind to him?

A. I don't recall walking in the bathroom with Cavness.

Q. You don't recall that? A. No.

Q. Anyway, you don't recall who handcuffed the Defendant at all? You don't remember that?

A. Well, during the course of the struggle when Cavness resisted arrest, that is what our object then was, attempting to handcuff him, to subdue him.

(Testimony of Paul Shaffer.)

Q. Would you say that Mr. Wells was mistaken or that [239] he was lying under oath if he stated on the stand that the Defendant at any time, never at any time struck back at any of you excepting for the first shoving?

A. I didn't get that question, Mr. Miho.

Q. I will reframe it.

Mr. Hoddick: May it please the Court, I think if Mr. Miho is going to frame hypothetical questions that they should be in line with the evidence which has been adduced here in court. I don't mind your taking from a portion of the record what Mr. Wells said and asking the witness whether that is true or not, but I object to your making up out of your mind what Mr. Wells said.

Mr. Miho: I will try to reframe it to suit your objection.

Q. Officer Wells took the stand under oath here and stated that excepting for the first shoving under Cavness——

Mr. Hoddick: Excuse me. If you are going to do that, I suggest that you go to the record and quote what Mr. Wells said. It is not that I distrust your memory but let's just be absolutely certain and not put these hypothetical questions to the witness.

Mr. Miho: May I have a moment with Mr. Hoddick?

The Court: Yes.

(Counsel confer.)

(Testimony of Paul Shaffer.)

Mr. Miho: I will reframe the question. It will take [240] too much time.

Q. Mr. Shaffer, according to Mr. Wells, there is nothing in his statement, statement by Mr. Wells, that Cavness threw any of your officers around like a bag of rice or something like that that you stated. There is nothing——

Mr. Hoddick: I object to that. The Jury knows what Mr. Wells said and I don't think you have any right to stand here and pretend to quote what Mr. Wells said.

The Court: Well, on that score, that is obvious. Mr. Wells didn't say anything about a bag of rice.

Mr. Hoddick: I understand that. But this is a continuing line——

The Court: Actually it was a bag of potatoes, is what the witness said.

Mr. Miho: Well, I got it twisted. A bag of potatoes.

The Court: But if you are purporting to quote what Mr. Wells said, in the face of an objection, maybe we had better take time to get what he actually said.

Mr. Miho: Well, we will have to read his entire testimony. It will take too long.

The Court: Maybe you can get that in a different way.

Mr. Miho: Yes.

Q. Mr. Shaffer, Mr. Wells did not state so far as I recollect, that the Defendant did anything other

(Testimony of Paul Shaffer.)

than struggle, struggle with you officers? [241]

A. That's right.

Q. Now, you state today that—one more thing: Mr. Wells stated that Cavness tried to get away from you officers but that outside of trying to get away and outside of struggling with you officers that is all Mr. Wells' statement goes to so far as Cavness' action.

Mr. Hoddick: That is incorrect, your Honor. Mr. Wells also stated that the Defendant tried to bite on the Vicks inhaler tube.

Mr. Miho: Oh, yes, I will stipulate to that.

Mr. Hoddick: But if you are going to put these questions to the witness, let's give him the whole background.

Mr. Miho: Rather than spend the time, I will withdraw the question.

Q. I want to ask you, you still say that this Defendant Cavness grabbed a hold of you officers and threw you around like a bag of potatoes? You still say that?

A. I didn't say that Cavness grabbed a hold of us. I said he was throwing us off.

Q. Excuse me.

A. He was throwing us off just like sacks of potatoes.

Q. Well, how was he able to do that without using his hands?

A. Shifting his body, pulling his arm this way and that way. [242]

(Testimony of Paul Shaffer.)

Q. He never used his hands to grab any of you, then?

A. No, he wasn't flipping us or throwing us around.

Q. Did he strike any of you with his fists at any time?

A. I don't recall.

Q. Did he bite any of you?

A. I didn't get bit.

Q. Do you recall someone saying, "You black son of a bitch." Do you recall that statement?

A. No, I don't.

Q. You don't recall that?

A. I don't recollect that.

Q. Maybe somebody did say that?

A. I don't know.

Q. You don't know?

Mr. Miho: That's all.

The Court: Redirect?

Redirect Examination

By Mr. Hoddick:

Q. Mr. Shaffer, you said that Officer Abbey forced open the Defendant's right hand and that Captain Whitford took something therefrom. What did Captain Whitford do within your sight with what he took from Caveness' hand?

A. As far as I could see, he kept it, held it and looked at it.

Q. Did he give it back to Officer Abbey or do you [243] remember——.

A. I don't recall now.

(Testimony of Paul Shaffer.)

Mr. Miho: Just a moment. That is a very leading question on a very material point. He is putting the idea in the witness' mouth.

The Court: Sustained.

Mr. Miho: He knows better.

By Mr. Hoddick:

Q. Mr. Shaffer, do you remember what Captain Whitford did with what he took out of Cavness' hand?

A. No, I don't recall exactly what he done with it.

Q. You stated on cross-examination that you turned the evidence which you had obtained over to Mr. Wells at the police station. Now, what evidence was that?

A. The four small pieces of that inhaler tube and the six capsules, those pills that had that white stuff inside of it.

Q. Did you find those four pieces of the inhaler tubes in the same area as where you found the capsules? A. Yes.

Q. Could you tell what part of the inhaler tube those four pieces came from?

Mr. Miho: Your Honor please, that is purely an opinion evidence calling for a conclusion, if your Honor please; unless he put it together or he is an expert along the line, [244] he is in no position to answer such a question.

Mr. Hoddick: I asked if he could tell.

The Court: If he knows, he can tell. Otherwise

(Testimony of Paul Shaffer.)

we are not interested in the speculation or opinion.

Mr. Hoddick: That's right. I will lay a foundation if the answer to that is yes.

The Court: All right.

Q. Mr. Shaffer, could you tell what part of the inhaler tube those four pieces came from?

A. I couldn't tell——

Q. Just answer that yes or no. Answer it yes or no.

Mr. Miho: The answer was interrupted and the answer was made, that I couldn't tell, before Counsel interrupted to try to change it.

Mr. Hoddick: Counsel didn't try to change it.

The Court: No, the answer came in while you were asking another question. Now, I will advise you also to ask one question at a time.

Mr. Hoddick: Yes, your Honor.

The Court: The witness said, "I couldn't tell." Is that correct?

The Witness: I didn't finish it.

The Court: All right, finish your answer.

A. (Continuing): I couldn't tell the exact part of the tube it came from. I did not reconstruct the tube afterwards. [245]

Q. Now, Mr. Shaffer, to whom did you give the four shattered pieces of inhaler tube?

A. Mr. Wells.

Q. And where did you do that?

A. In Captain Whitford's office at the vice squad, police station, Honolulu.

(Testimony of Paul Shaffer.)

Q. And when did you do that?

A. As soon as we came back to the station. I don't recall the exact time. The time was taken down.

Q. And was the condition of those pieces at the time that you gave them to Mr. Wells any different than at the time you found them?

A. No, sir. They were in the same condition as when I found them.

Q. And what did Mr. Wells do with those pieces in your presence?

A. I marked them. Then he wrote down what they were. He recorded them.

Q. Did he place them in any kind of a container?

A. Yes, I believe he put them in an envelope.

Q. Did you make any identifying marks on that envelope? A. Yes, my initials.

Q. Is that the only envelope which you initialed in connection with this case?

A. I believe so. [246]

Mr. Hoddick: May I have Exhibit "C" for identification purposes?

Q. I show you Exhibit "C" for identification purposes and ask if your initials appear thereon?

A. "P.S." there. This is my handwriting. And this is the envelope I chiseled from the drug store at King and Nuuanu Street. We didn't have any.

The Court: What?

A. This is the envelope I chiseled from the drug

(Testimony of Paul Shaffer.)

store at King and Nuuanu Street. We didn't have any in the department that small. And that is my handwriting on there with the date and the time.

Q. I ask you to open this envelope, Mr. Shaffer. (Witness opens small envelope.) Pour the contents out in your hand. What do you have there in your hand that you poured out of your envelope?

A. Four pieces of broken Vicks inhaler tube.

Q. Are those pieces in the same condition as when you found them? A. Yes, sir.

Mr. Hoddick: Now, at this time, your Honor, I'd like to offer those four pieces in evidence as the Government's first exhibit.

Mr. Miho: We object to that introduction, on the grounds, on the motion that we have heretofore filed, your Honor. [247]

The Court: The witness may put them back in the envelope. The Jury will be excused at this time and I will hear Counsel on the point of law. So if the Jury will step outside, please——

(The Jury leaves courtroom at 10:35 a.m.)

The Court: The record may reflect that the Jury is now outside of the courtroom, beyond hearing, and that the Defendant is present. There is offered in evidence through this witness four broken pieces of what he says came from a Vicks inhaler. The objection is on the grounds stated in the motion to suppress. On the one hand, Mr. Hoddick, as you offer this, what crime have you established in order to have evidence put in which is

relevant thereto? In other words, where is the *Corpus delicti*?

Mr. Hoddick: Your Honor, on the question of proving the *Corpus delicti* I think it rests within the Court's discretion as to whether that must be proved before the introduction of any evidence or not. As a matter of fact, all of this evidence together, which I hope to have admitted by this Court, will establish the *Corpus delicti*.

The Court: Well, I recognize you have to put it in little by little but it seems to me that on your theory of the case broken pieces of a Vicks inhaler are insignificant unless you first establish that there is some offense. There is no reason why you can't call this witness back. [248]

Mr. Hoddick: No, I am perfectly amenable to that procedure. I simply wanted to follow this through in a certain chronological order which I thought would make a clearer story for both your Honor and the Jury.

The Court: Well, actually the objection is not on that ground.

Mr. Miho: Yes.

The Court: But it occurs to me that——

Mr. Hoddick: This will all tie in together before we get through.

Mr. Miho: Your Honor please, to save time I believe it would be better if we argued the introduction of all of this evidence because they are all related and the grounds of the objections are the same. The argument is the same. That Counsel in-

introduce all of it at the same time, after having done whatever he wants to lay the foundation down for its introduction, and we argue the matter all together at one time instead of piecemeal on it.

Mr. Hoddick: Well, on the other hand——

Mr. Miho: He loses nothing. Excuse me if I may interrupt. His case is not prejudiced in any way by having established everything first and then we argue the motion at the same time, your Honor, all at one time.

Mr. Hoddick: I don't object to that, Mr. Miho. I do have in mind this: We might stipulate that if the grounds [249] for your objection to the introduction of the evidence which we have marked here for identification purposes are going to be the same, that we can probably dispose of that question once and for all at the beginning, and then in the future when I offer, having established the continuity of the chain of evidence, I presume that you can renew your objection, but the Court can consider whatever argument I am predicating this on, on the theory that the Court will rule with the Government on this objection. But you can make your objections and stipulate that your argument would be the same. And then I presume in due course the Court will overrule each objection as it came along. And you can take an exception to each case. On the other hand, your Honor, if we are not permitted to introduce this on the grounds of Mr. Miho's objection, then I will assume that the rest of the evidence for those grounds is likewise inad-

missible, and if it is inadmissible I am going to be forced to rest our case.

Mr. Miho: Your Honor please, Mr. Hoddick forgets that these pieces of evidence were not handled and picked up by one and the same party, your Honor. There are so many parties involved. And how can I stipulate that the proper foundation would be laid outside of this motion, outside of this motion, that the proper foundation be laid for his introduction as they come along beforehand? That would be unfair to me and to my Defendant. [250]

Mr. Hoddick: You are perfectly right. The only thing that I can suggest in that regard is that as far as the objections which you have set forth in your motion, and so far as the objections which you apply to these four pieces are concerned, they will apply equally to other evidence.

Mr. Miho: Oh, yes.

Mr. Hoddick: If we fail to establish proper grounds for getting them in, you can object on that ground.

Mr. Miho: So long as we understnad clearly that the motion, as we understand it, that the grounds apply to all of it, to all of your evidence. But as to its admissibility in pieces as they come along, that is an entirely separate matter.

The Court: That is right.

Mr. Hoddick: Your Honor, also on that score I am afraid we are going to run into trouble because I can foresee certain grounds which Mr. Miho might urge in connection with these pieces

which he could not urge in connection with that evidence which was found within the house.

The Court: With respect to these pieces, are they stated in your motion?

Mr. Ahrens: Yes, all.

The Court: All right. I will take a brief recess and you can prepare to argue your motion in full. We might as well hear it now, before, as well as later. And as you [251] correctly both state, whatever disposition is made of the motion does not in any way preclude you from later making individual specific objections as individual things are offered in evidence. But this motion is directed towards the things recited in the motion claiming that they cannot be used in evidence in this case on the grounds that there has been an illegal search and seizure.

Mr. Hoddick: Your Honor, might I suggest that at the time that Mr. Miho filed this motion with the Court it came as a surprise. We had expected it prior to trial, at least longer than a few minutes. Consequently, I had not as yet had an opportunity to work up any material in defense to this objection. And if it would meet with the Court's convenience, I would like to suggest an adjournment until after lunch, and in the meantime I will endeavor to get whatever material we have together.

The Court: Well, you have the lunch hour. I will hear Mr. Miho's argument. Then I will take a recess and you can be preparing to go on after lunch.

Mr. Hoddick: Thank you, your Honor.

The Court: Will you call the Jury back and I will excuse the Jury until two o'clock.

(Jury returns to courtroom.)

The Court: You are going to be excused in a moment, so whoever wants to save time can come over and get your hat and [252] raincoat. The 12 jurors now being present, as well as the Defendant, I will advise the Jury at this time that I am excusing them until two o'clock. During the interim I am going to hear Counsel on a motion. So if you will report at two o'clock, we will be able to proceed. And at this time the Court will take a short recess and hear argument upon its return. Before we take the recess, the witness wants to give the clerk this envelope.

(A short recess was taken at 11:03 a.m.)

After Recess

The Court: Very well. I will now hear in its entirety the motion to suppress.

Mr. Ahrens: Your Honor, at this time we would like an oral amendment to our motion for suppression to include the box and 29 capsules, 29 empty capsules that were found in the Defendant's dwelling house.

The Court: That makes a second amendment. The first amendment that I allowed the other day related to the date.

Mr. Ahrens: To the date.

The Court: And now you wish to include the 29 empty capsules?

Mr. Ahrens: That's right, your Honor, that were found in the dwelling house.

The Court: All right. Any objection?

Mr. Hoddick: No objection. [253]

The Court: All right.

(Arugments on motion presented.)

The Clerk: Mr. Clerk, notify the jurors that, as is not unusual, things take longer than we have anticipated, and I will excuse them until nine o'clock tomorrow morning.

(The Court recessed at 12:23 p.m.)

Afternoon Session

(The Court convened at 1:40 p.m., the Jury being absent.)

(Counsel continued with arguments on the motion to suppress.)

(The Court adjourned at 4:30 p.m.) [254]

December 9, 1949

(The Court convened at 9:00 a.m., the Jury being absent.)

(Counsel resumed argument on motion to suppress.)

The Court: Let me go over that again on the search warrant. I do limit the seizure to that which the search warrant prescribes, namely, cocaine. Now, if upon the search either in the house or in the yard—although I don't think they relied on the

search warrant in the yard at all—there was pursuant to that search warrant uncovered and seized cocaine attached to something, I don't know what it is like, whether it naturally attaches itself to something or nothing, but if it attaches to something or if it is in something, all right, I will deem that to be within the scope of the search warrant. But if there are empty capsules or if there is a genuine Vicks inhaler tube that the talk seems to be centering about, I don't deem that to be within the scope of the search warrant. Do I make myself clear?

Mr. Hoddick: That is clear. But then on the grounds of the arrest, all corroborative evidence, cocaine or otherwise, found in the yard——

The Court: That is different.

Mr. Hoddick: ——is admissible. Now, also there comes up a question as to whether corroborative evidence found in the house will be admissible on the grounds of the arrest, [255] of a lawful arrest.

The Court: Well, I don't know exactly what you are talking about, but if on some other basis than this search warrant, with respect to something inside the house, you can get it in, all right. But I am just talking about the search warrant today. I repeat, I don't think they relied on the search warrant in the yard at all. It just happened to be while they were there something else more important happened under their eyes, before their noses. All right. Nine o'clock tomorrow morning we will proceed with the trial, and as we do, I want to

remind you now and probably will again that whenever we do anything like this by inquiry of interrupting the trial to hear motions such as this all of us except the Jury are apt to assume that certain things are already in or that certain persons testified thus and so. So I caution you to remember that the evidence taken on the motion has no bearing on the trial, and don't rely in any way on any false impressions in that regard. All right.

(The Court adjourned at 12:08 p.m.) [256]

Certificate

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in Criminal No. 10,256, United States of America versus Orestus Cavness, held in the above-named court on December 5, 7, 8 and 9, 1949, before the Hon. J. Frank McLaughlin, Judge, and a Jury.

/s/ ALBERT GRAIN.

Feb. 2, 1950.

December 12, 1949

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness, for further trial.

Mr. Hoddick: Ready for the Plaintiff, your Honor.

Mr. Miho: Ready for the Defendant.

The Court: Note the presence of the jury and of the defendant.

Mr. Miho: May we note for the record at this this time an exception to your Honor's ruling on the motion.

The Court: You may. I do not believe under the new rules you have to note an exception. I think it is automatic, but to be on the safe side you may note it.

It occurs to me as I look at the blackboard this morning that some marks have been placed upon it during the hearing of the motion that are meaningless to the jury. Perhaps it might be a good idea, as a suggestion, to erase the diagram and draw a new one, unless there is something you want left on there or something put on during the argument on the motion.

Mr. Miho: It is all right with me to have it erased.

Mr. Hoddick: It is satisfactory to the Government.

The Court: Erase the blackboard.

(Blackboard erased.)

PAUL SHAFFER

resumed the stand and testified further as follows:

The Court: This witness, I think, has been previously sworn. At the time the trial was interrupted to hear the motion, Captain Whitford was on the stand.

Mr. Hoddick: Your Honor, I think Mr. Shaf-

fer was on the stand, and I offered the contents of Exhibit C for identification purposes. It was at that stage we argued the motion for suppression of evidence.

The Court: That's right. I have my notes on the motion to suppress in the same file.

Mr. Hoddick: This was on redirect examination of this witness, your Honor.

The Court: All right.

Mr. Hoddick: May I renew that offer to have admitted in evidence the contents of envelope marked Exhibit C for identification purposes, consisting of four shattered pieces of a Vicks inhaler tube found by Officer Shaffer in the defendant's yard after the struggle.

Mr. Miho: We are still objecting, if your Honor please, no proper foundation being laid.

Mr. Hoddick: May it please the Court, the witness Wells testified that he was given the pieces, that he placed them in an envelope, I believe in Shaffer's presence. They remained in that envelope until the time that he brought them into the court room. There has been no substitution, no alteration. They were in the same condition as when they were [2] given to him by Shaffer. Shaffer testified that he found them in the yard and at the time he gave them to Mr. Wells, they were in the same condition as when he found them at the scene of the struggle. There has been other testimony to the effect that the defendant endeavored to chew on this Vicks inhaler tube, and in so doing the tube

(Testimony of Paul Shaffer.)

was broken. I think that is adequate foundation for admission into evidence.

The Court: Very well. The objection is overruled. Exhibit B for identification may become——

The Clerk: Exhibit No. 1. United States Exhibit No. 1.

Mr. Miho: Save an exception.

The Court: Granted.

Mr. Hoddick: May it please the Court, that was Exhibit C for identification purposes.

The Clerk: That's right.

Mr. Hoddick: Not Exhibit B.

The Court: Yes, C; I beg your pardon. United States Exhibit C for identification, which becomes Exhibit 1. All right.

(Thereupon, the document previously marked Exhibit C for identification was received in evidence as United States Exhibit No. 1.)

Mr. Hoddick: No further questions, your Honor.

The Court: Is there any further cross-examination? [3]

Mr. Miho: May I look at the exhibit, if your Honor please. I haven't seen it.

The Court: I believe it was exhibited the other day. You may not remember it, but this witness opened that envelope and took those pieces out.

Mr. Miho: I would like to renew the objection further on the grounds—Well, I can probably clear it up.

(Testimony of Paul Shaffer.)

Recross-Examination

By Mr. Miho:

Q. Who made these marks on these pieces?

The Court: What?

Q. Who made the marks on these pieces, in ink, if you know? A. Which marks?

Q. Well, do you know if there are ink marks on these pieces or not?

A. I put my initials on.

Q. On each piece? A. Yes.

Q. Where?

A. I believe it was on the inside where it would be legible.

Q. I am speaking of at what place?

A. You mean where I wrote them?

Q. Yes. [4]

A. At the police station before I turned them over to Mr. Wells.

Q. What marks did you put on the pieces?

A. "Ps."

Q. And where did you put the marks? Where and where did you put the marks? A. What?

Q. With relation to the pieces, where and where did you put the marks?

The Court: Where and where?

Mr. Miho: Yes.

Q. (By Mr. Miho): What parts of each piece did you put the marks so-called?

A. I believe it was on the light side of them.

Q. The light side? A. Yes.

Q. You mean the white side, the inside?

(Testimony of Paul Shaffer.)

A. Well, the light colored side. I believe that is where I put the marks.

Q. And at that time were there any other marks on the pieces? Anybody else make marks on the pieces that you know of?

A. No, I don't recall anybody else.

The Court: Speak louder.

The Witness: I don't recall anybody else putting [5] marks on them.

Q. You put the initials "PS" on it?

A. My initials, yes.

Q. On each piece? A. Yes.

Q. And so far as you know, from the time you had it until the time you handed it over to Agent Wells of the vice squad and until you saw it here before this Court, those are the same pieces?

A. That is correct, Mr. Miho.

Q. And you examined them carefully; is that right? A. Yes.

Q. In court? A. Yes.

Q. And so far as you know the only marks that you put on it were the marks "PS," your initials? A. My initials I put on it.

Q. And when you got them back that is all there was on the pieces; right?

A. When I got them back?

Q. When you saw them in court the other day.

A. I believe so. That is all.

Mr. Miho: I still renew my objection, if your Honor please. These marks are not all marked

(Testimony of Paul Shaffer.)

“PS,” unless my knowledge of the English lettering is not correct. Marks [6] on both the inside and outside, and not only on the inside.

Mr. Hoddick: Could I ask a further question of the witness.

The Court: Yes.

Mr. Hoddick: Look at these four pieces. Do your initials appear on each one of them?

The Witness: Yes, they do.

Mr. Hoddick: And on which side?

The Witness: On the light side.

Mr. Hoddick: Now, are there marks on the other side?

The Witness: Yes, appears to be marks. I can't read them.

Mr. Hoddick: Did you notice those the first time you examined the pieces?

The Witness: In court here?

Mr. Hoddick: Yes.

The Witness: They appear to be the same.

Mr. Hoddick: No. I say, did you notice those marks on the outside the first time you examined the pieces?

The Witness: Yes, I believe they were there.

Mr. Hoddick: I am talking about the ink marks on the outside of these pieces.

The Witness: Yes.

Mr. Hoddick: Your Honor, I submit that regardless of the marks that appear on the outside of the pieces, that would [7] only go, if anything, to the amount of weight which is to be given to

(Testimony of Paul Shaffer.)

this witness' evidence and would not run to the admissibility of the evidence. He has positively identified them as the same pieces and the marks that he put on them down at the vice squad office.

The Court: I don't think the witness is following either of you. I understand you, Mr. Witness, to say you picked these pieces off the ground after the struggle at the defendant's residence; is that right?

The Witness: Yes, sir, I did.

The Court: At that time were there any ink marks on those pieces?

The Witness: No, sir, not at that time.

The Court: I understand you further to say that you put your initials "PS" on the light side of each of those four pieces, at the police station.

The Witness: Yes, sir, I did.

The Court: Did anybody else, to your knowledge, put any ink marks on any one of those four pieces?

The Witness: I believe Mr. Wells did when I turned them over to him.

Mr. Miho: If your Honor please, I move that answer be stricken and the jury duly instructed to disregard it.

The Court: I am not interested in what you believe, and therefore the jury is to disregard it. The question is, [8] Do you know?

The Witness: Yes, Mr. Wells did.

The Court: Did you see him do it?

The Witness: He done it in my presence.

(Testimony of Paul Shaffer.)

The Court: You must have seen him then.

The Witness: Yes, sir, I did.

The Court: What are those other marks on each of those four pieces? Show him.

The Witness: It is writing in ink, but apparently it is blurred. It looks like "WW."

The Court: What?

The Witness: "WW." They are supposed to be Mr. Wells' initials.

The Court: Well, are those marks that are on there in ink, which are other than your initials, the marks which you say you saw Mr. Wells put on those pieces?

The Witness: Yes, sir.

The Court: Based on my questions, either of you may ask further questions.

Mr. Hoddick: No further questions.

Q. (By Mr. Miho): You say now you saw Mr. Wells mark those pieces in your presence?

A. Yes.

Q. At the vice squad? A. Yes.

Q. You saw that yourself? [9] A. Yes.

Q. He must have been sitting right by you or standing right by you?

A. He was sitting directly across from me.

Q. And what kind of marks did you see him make? A. Held the piece in one hand.

Q. A, B, C, D, E, F, G. Going down the alphabet, what kind of letters did he put on the pieces?

A. I couldn't tell.

(Testimony of Paul Shaffer.)

Q. Didn't you see him? Didn't you say you saw him marking it right in front of you?

A. That is correct. He had the piece and he held the pen, and it was a small piece, and he had to write with a pen. I didn't look at it after he wrote.

Q. You are sure he made some kind of a mark?

A. That is correct.

Q. You say he put the initials "WW" on it?

A. That's what it looks like.

Q. Why did you say a while ago, in my first questioning, before His Honor started to ask you questions, "I believe Mr. Wells marked them"?

The Court: Well, now, either that is in or out. If it is out, you can't ask a question based on it. That has been stricken at your request. Now you ask a question based on it.

Q. (By Mr. Miho): Did you make such a statement: "I [10] believe Mr. Wells marked them in my presence"? A. That's right.

Q. Later on you went on to state you actually saw him do it, that it was not belief but an actual seeing. A. That's right.

Q. Is this a "WW" here? You have seen this three or four times in court. Is that a "WW" mark?

Mr. Hoddick: Your Honor, I suggest that whatever marks that are on those pieces will speak for themselves. This man's conception of whether it is a "WW" or "YY" is hardly material to this case.

(Testimony of Paul Shaffer.)

Mr. Miho: Will you answer the question?

Mr. Hoddick: Wait, there is an objection.

The Court: Yes.

Mr. Hoddick: There is an objection.

The Court: The question may be answered.

A. I can't tell what that is.

Q. (By Mr. Miho): Does it look like an "A" to you, an "AA"; you have been to school.

A. But that is a funny looking "A."

Q. It looks like an "A" more than a "W," doesn't it?

A. It looks like a couple of scratches to me.

Q. What does this look like to you? Does it look like a "K" or a "W" to you?

Mr. Hoddick: Mr. Miho, I believe you objected to [11] the admission of this evidence.

Mr. Miho: It has been admitted over my objection, and I have a further right to use it.

Mr. Hoddick: You made a further objection which has not been ruled on by the Court.

The Court: That is right.

The Witness: This one piece——

The Court: Just a minute. Actually, at the time Mr. Wells, on the witness stand, took this, among several other envelopes and things, out of a big envelope, all we knew about it was it had the initials of Mr. Wells and possibly this witness on it. The other day when this witness opened the small envelope in court all he identified, as I recall, were the four pieces, without reference to any ink marks or initials.

(Testimony of Paul Shaffer.)

Mr. Miho: That's right.

The Court: Now for the first time, after it has been offered and received in evidence, you both start talking about initial marks on the four pieces.

Mr. Miho: The other day in court, if I may clear your Honor's recollection, I didn't have an opportunity to examine them very closely, if your Honor please. I was only interested from what the evidence was. I had never seen it until that day in court. It never occurred to me that there were any initial marks on it.

The Court: Well, the initial marks, as the witness [12] so testifies at the moment, are at most identification marks to trace the chain of possession.

Mr. Miho: That is right.

The Court: But I would much prefer, before you offer anything in evidence, to have the entire basis of it and not have it come in piecemeal.

Mr. Hoddick: Your Honor, I myself told the witness to look at the pieces and see if there were marks on them.

The Court: The fact that there are other ink marks on it doesn't destroy the fact that he identifies his initials on it. And he gave it to Mr. Wells. All the other marks—or what the other marks are, all he can say, as he has said, is that he saw Mr. Wells put something on in ink.

Mr. Miho: But they have got to be traced before they are admissible in evidence.

(Testimony of Paul Shaffer.)

The Court: Well, the testimony is that after he put his initials on them, he gave them to Mr. Wells, and that was the last he handled them until he opened them in court. Mr. Wells testified he received them from this man and kept them from that date until he brought them into court.

Mr. Miho: Then your Honor is overruling my objection?

The Court: Yes, your second objection is overruled.

Mr. Miho: Save an exception, if your Honor please.

The Court: Yes.

Mr. Miho: May I now show this to the jury.

The Court: Yes.

(Document handed to jury.)

Q. (By Mr. Miho): Did you go down to the Emergency Hospital with the defendant and Officer Marcotte before you went down to the vice squad?

A. Yes.

Mr. Hoddick: Objection, your Honor. Well, he has answered the question.

Q. And what part of your pocket did you have these pieces in? A My shirt pocket.

Q. Shirt pocket. And you found these pieces after the struggle; is that right?

A. That's correct.

Q. After the struggle. And who was present with you when you saw these pieces?

(Testimony of Paul Shaffer.)

A. Officer Abbey was outside and Agent Wells.

Q. They were all with you at the time you picked them up?

A. There were several of them around there.

Q. Was the defendant with you?

A. I don't recall his exact position at the time.

Q. Anyway, it was after the struggle, and the defendant, with Mr. Wells, had gone into the house once, and Abbey said something about finding something, and you came out of the [14] house, and that is when you found these four pieces?

A. I came out of the house and also Mr. Wells, and the defendant, if I recall correctly.

Q. Well, don't you know whether the defendant was with you at the time you picked these pieces up from the ground?

A. At the time I picked them up from the ground I don't know his exact position, exactly where he was.

Q. You picked them up, showed them to Mr. Wells, you said; right?

A. That's correct.

Q. And then you put it in your pocket?

A. That's right.

Q. And when you were struggling with the defendant, you didn't see any pieces like that at any time; is that right? When you were trying to subdue the defendant, you never saw any pieces like that on him or on the scene at any time during the time that you were trying to subdue the defendant?

(Testimony of Paul Shaffer.)

A. At the time I was trying to subdue the defendant the only thing I saw was the small white pieces that fell.

Q. From where?

A. From the vicinity of his hand.

Q. You just looked at it? A. What?

Q. The vicinity of his hand? Which hand?

A. The hand he had that object in, the right hand. [15]

Q. The right hand. How did it happen to fall out, do you recall?

A. I don't recall exactly how it fell out. All I had was a glimpse of the pieces dropping. What they were I don't know.

Q. And what did you do when you saw pieces dropping?

A. I was still hanging onto the defendant.

Q. I see. Did you ever see the defendant have his two hands like this (indicating) together in front of his mouth at any time?

A. Two hands?

Q. Yes, to his mouth.

A. I don't recollect. I was on his back. I know he had one hand up to his mouth. That is when I heard that chewing sound.

Q That is when you saw him put one hand up to his mouth? A. That's right.

Q. His right hand? A. That's right.

Q. That is when he was flat on his stomach, or when he was still standing up?

(Testimony of Paul Shaffer.)

A. He was half down and half up.

Q. Half down and half up. And that is the time you were trying to give him a choke hold, as you told us the other day, a choke hold on him?

A. That's right.

Q. And he was trying to chew at the same time you were giving him a choke hold; is that right?

A. Yes, that's right.

Mr. Miho: That is all.

The Court: Very well, you are excused.

(Witness excused.)

The Court: Next witness.

Mr. Hoddick: Officer Abbey, please.

ARTHUR F. ABBEY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name, age, residence, occupation, and citizenship.

The Witness: Arthur F. Abbey, 3812 Leahi Avenue.

The Court: Honolulu?

The Witness: Honolulu.

The Court: Age?

The Witness: Age 28.

The Court: Occupation?

The Witness: I am a reserve police officer.

The Court: Speak louder.

(Testimony of Arthur F. Abbey.)

The Witness: Reserve police, City and County of Honolulu, Territorial deputy high sheriff. With the Encyclopedia Britannica. [17]

The Court: Citizenship?

The Witness: United States of America.

The Court: Only?

The Witness: Only.

Direct Examination

By Mr. Hoddick:

Q. How long have you been a reserve police officer, Mr. Abbey?

A. Approximately, almost a year, sir.

Q. And where do you live?

A. 3812 Leahi Avenue.

Q. And do you know the defendant Orestus Cavness?

A. Yes, sir.

Q. And where does he live?

A. 3811 Leahi Avenue.

Q. And where is 3811 Leahi Avenue in relation to your house?

A. About directly across the road from mine.

Q. Did you participate in a raid on the defendant's premises with Mr. Wells on July 19, 1949?

A. Yes, sir.

Q. What time did that raid take place?

A. Approximately at 5:40.

Q. In the afternoon?

A. P.M., yes, sir.

Q. And where were you immediately prior to the raid? [18]

(Testimony of Arthur F. Abbey.)

A. In my residence at 3812 Leahi Avenue.

Q. Was there anybody else there with you?

A. Yes, sir.

Q. Who?

A. Agent Wells, Captain Whitford, Sergeant Sousa, Officer Shaffer, and Officer Sasaki.

Q. How long had they been there?

A. They reached my house at approximately 2:40 p.m.

Q. And you say the raid was made at approximately 5:40? A. Yes, sir.

Q. Will you describe what happened from the time that the officers and you left your house.

A. Agent Wells said that the defendant had returned. He had left my premises, with other officers I had mentioned following. I was the last one to leave my residence. I saw Agent Wells approach the defendant, the car door was opened, and as I was coming across the street, the defendant pushed Agent Wells on this part of the body (indicating). As I ran up, I grabbed the defendant by the leg and the struggle took place.

Q. Approximately how long did the struggle last?

A. From three to four minutes, approximately.

Q. And what was the outcome of the struggle?

A. Well, the defendant was—he struggled; he was on the ground, he got up two or three times, and the last time he [19] was down Captain Whitford was trying to remove an object from his right

(Testimony of Arthur F. Abbey.)

hand. He was trying to open his hand, and Captain Whitford asked me to use my blackjack on the back of his hand to open it up. At that time he had removed a part of a Vicks inhaler.

Q. You did use the blackjack on the back of the defendant's hand? A. Yes, sir.

Q. And as a result of that the defendant opened his hand? A. Yes, sir.

Q. And you removed the part of the Vicks inhaler? A. Captain Whitford.

Q. Go ahead.

A. Then Agent Wells asked me to assist him in opening up the left hand, which I tried to do so, and he directed me to use the blackjack in the same manner. At that time when his hand opened I noticed a small object falling from his hand. Immediately after, he said, "Take me in the house," and he stopped struggling. At that time I handcuffed him and Agent Wells and the other officers went in the house with him.

I went back to the base of the cocoanut tree to see what had fell from his hand at the struggle.

Q. Did the struggle take place near the cocoanut tree?

A. Yes, sir. I picked up the top of a Vicks inhaler, and I noticed two capsules adhesive to it. I put it back on [20] the ground where it was laying and I called Agent Wells at once, and he came out.

Q. Did you stand by there until Agent Wells arrived?

(Testimony of Arthur F. Abbey.)

A. I did, sir. And he picked it up and examined it and handed it to me. I held it until we was into the station, which I turned it over to him and initialed it with my initials on it.

Q. Dd you hold it in your hand or did you put it in your pocket?

A. I put it in my pocket after Agent Wells handed it back to me after he had examined it.

Q. Which pocket did you put it in?

A. I believe it was my left one.

Q. Did you say you put your initials on it?

A. Yes, sir, at the police station.

Q. Handing you United States Exhibit A for identification purposes, will you open it and tell us if the piece that you picked up from the ground is in there.

The Court: Wait a minute. Let the record show that as he opened the large envelope he removed from it two small sealed envelopes, one of which he is now opening. Which one are you opening?

Mr. Hoddick: May the record show, your Honor, that one sealed envelope has written on it in ink "Exhibit 2," and the other sealed envelope has written on it in ink "Exhibit [21] 3."

The Court: Which one did the witness start to open?

Mr. Hoddick: Exhibit 2, your Honor.

The Court: This is not the one he started to open. What is that?

(Testimony of Arthur F. Abbey.)

Mr. Hoddick: That was 3. I think this was torn.

Mr. Miho: He just started to open it.

Q. (By Mr. Hoddick): Well, now, before you open either of them, after you gave this piece of Vicks inhaler tube, with the two capsules adhesive thereto, to Mr. Wells down at the police station, did you see what he did with the part that you gave him?

A. He had sealed it in an envelope, I believe, at that time.

Q. Did you see him do it? A. Yes, sir.

Q. He did it in your presence?

A. Yes, sir.

Q. And did you see him write on that envelope?

A. He was writing something. I didn't recall what it was.

Q. Did you make any marks on the envelope that he put the part into, the part that you had found? A. I don't recall.

Q. Mr. Abbey, I ask you to open the envelope, not the [22] one that you started to open, but the other one, marked Exhibit 2. A. Yes, sir.

Q. And examine the contents.

Mr. Miho: If your Honor please, I believe Counsel has no business to direct the witness to open any particular envelope, if your Honor please, unless he can explain the reason for it. The record shows that this witness, after what purported to be a proper foundation was laid, was

(Testimony of Arthur F. Abbey.)

asked to open the envelope that he was talking about. For Counsel to switch now to some other envelope and lead him on into a particular envelope is entirely incorrect, if your Honor please, under the circumstances.

The Court: It all came about simply because I wanted to know which envelope he was tearing, and he did tear one to a small extent, one of the smaller of the two envelopes that came out of the big one. Now your objection presently is to his being directed to start tearing open the other envelope?

Mr. Miho: Yes. You see, he was asked to open the envelope in which the object he was talking about was placed and he did reach for an envelope there after looking at both of them.

The Court: Mr. Witness, can you tell from looking at those two small envelopes which one contains the object you are talking about? [23]

The Witness: No, sir.

The Court: Did you put the object you have been testifying about in either of those envelopes?

The Witness: No, sir.

The Court: There has been nothing about these two small envelopes. Mr. Wells, when he was on the stand, as to this big envelope, started to tear it open and he was stopped.

Mr. Miho: That is right.

The Court: And a moment ago this witness was asked to tear this big envelope, and he took

(Testimony of Arthur F. Abbey.)

two little envelopes about which he knows nothing.

Mr. Miho: Except he saw Mr. Wells put the article he found into a small envelope.

The Court: It might be two other small envelopes for all I know.

Mr. Hoddick: Mr. Witness, will you read the writing on the envelope that you did not tear.

Mr. Miho: If your Honor please, I will object to that. That is certainly leading him on as to what is in there, unless he put it in himself and wrote it on there himself. He is not the proper person.

The Court: I think you had better withdraw him and put Mr. Wells back on the stand.

Mr. Hoddick: Your Honor, he can identify, I suspect, the contents of one of those envelopes. Obviously, with no [24] identifying symbols on the envelope itself he is unable to tell the envelope it is except from what it says.

The Court: From his testimony that appears clear.

Mr. Hoddick: All he has to do, if my presumption is correct—and if it is not, then obviously we are not going to be able to get the evidence in. All we have to do is have him look at the contents of those envelopes and he can identify which piece was the one he found.

The Court: If you want him to tear open both of them, go ahead. Let's trace this thing.

Mr. Hoddick: We have it traced as far as the

(Testimony of Arthur F. Abbey.)

contents are concerned, and I don't think the envelopes make a particle of difference.

The Court: I agree with Mr. Miho. You can't direct him as to which envelope to open.

Q. (By Mr. Hoddick): All right, Mr. Abbey, will you open both of those envelopes and don't destroy the writing on the outside.

Mr. Miho: I object. Mr. Hoddick knows how to present evidence in the way it should be presented to the Court and jury, if your Honor please. He knows what steps to follow, and I believe your Honor even instructed him a moment ago how to proceed with this evidence.

The Court: I am not trying his case for him. He can do it any way he wants. [25]

Mr. Miho: He is not the person who placed anything in an envelope that is being presented here, if your Honor please.

The Court: All right, Mr. Miho, there is no need of discussing it any further. All he is asking the witness to do is to tear open two envelopes, which he is physically able to do. Go ahead, Mr. Witness. You are asked to tear open two envelopes. Do it; then stop. Just tear them open. That is what you were asked to do.

Q. (By Mr. Hoddick): Mr. Abbey, will you examine the contents of either one of those envelopes and advise us as to which envelope you are looking into, whether it is Exhibit 2 or Exhibit 3.

(Testimony of Arthur F. Abbey.)

Mr. Miho: If your Honor please, we still renew our objection. It is entirely improper for evidence to be submitted by Counsel in this fashion.

The Court: Overruled.

Mr. Miho: Save an exception.

The Witness: Exhibit 2.

The Court: And what are the contents of that?

The Witness: The top of an inhaler tube.

Q. (By Mr. Hoddick): Is there anything adhesive to the top of that inhaler tube?

A. Yes, sir. Part of a capsule.

The Court: Wait a minute. The thing you removed [26] from that small envelope marked Exhibit 2 by somebody else—it is not an exhibit in this case—is that what you say you picked up at the defendant's premises and later gave at the police station to Mr. Wells?

The Witness: Yes, sir.

Q. (By Mr. Hoddick): Mr. Abbey—

The Court: Wait a minute. I think the record should describe what he took out of that envelope in terms of being two separate things. I don't want you to describe them other than in terms of being objects. He took out two separate things from that small envelope. All right.

Mr. Hoddick: That is agreed.

Q. (By Mr. Hoddick): Do your initials—Are there any identifying marks on either of those objects which you just took out of the small envelope? A. Yes, sir.

(Testimony of Arthur F. Abbey.)

Q. And what are they and on which object, the larger or the smaller?

A. At the time I initialed these, your Honor, I used the pen——

The Court: Louder.

A. (Continuing): At the time I initialed these, I used the pen and it looks like it has been rubbed. However, it is hard to make out my initials at this time.

Q. (By Mr. Hoddick): Was the part which you gave to [27] Mr. Wells in one piece, one whole, or two pieces?

A. One whole piece, sir.

Q. So that is not in the same condition now as it was when you gave it to Mr. Wells?

A. No, this part here was stuck to this object here, capsules.

Q. Are those, what you have described as capsules, in the same condition as they were when they were stuck to the inhaler tube?

Mr. Miho: If your Honor please, the exhibit speaks for itself. There is certainly no capsule in the top of the piece.

Mr. Hoddick: I said as he so described as having been capsules.

The Court: Well, the witness did use that word. Whether it is or isn't is a question of fact, but whatever the smaller of the two pieces is, I understand him to say at the time he gave it to Mr. Wells it was attached to the larger piece.

Mr. Hoddick: That is correct.

(Testimony of Arthur F. Abbey.)

The Court: You are asking him now, in view of the fact there are two pieces, whether or not these two things are now in the same condition as when he gave them to Mr. Wells; and, obviously, from his prior testimony, the answer is "no." [28]

Mr. Hoddick: He said "no" to that, your Honor.

The Court: You said no they are not now in the same condition as when you gave them to Mr. Wells?

The Witness: That is right, your Honor.

The Court: Two pieces instead of one.

Mr. Hoddick: I am also asking the witness if the smaller piece, which he said was attached to the larger piece, by itself is in the same condition.

The Witness: Yes, sir.

Q. (By Mr. Hoddick): It is?

A. The smaller piece, yes, sir.

The Witness: May I retract that statement, your Honor. At the time I found this top of this capsule, the Vicks inhaler, there were two capsules placed in there. It looks to me at this time this one here is dried up. They were both about the same size.

Mr. Miho: If your Honor please, I move any opinion evidence like that be stricken.

The Court: That may go out.

Mr. Hoddick: He has simply testified that the condition of those smaller particles has changed.

Mr. Miho: To explain how part of it has disappeared is something else again.

(Testimony of Arthur F. Abbey.)

The Court: The witness' last answer is stricken and the jury instructed to disregard it. All he can say, which [29] he has said, is it is not now in the same condition as when he gave it to Mr. Wells.

Q. (By Mr. Hoddick): But from the time you found that larger piece with the smaller piece adhesive thereto until the time that you gave it to Mr. Wells, was there any change in its condition?

A. What was that question?

Q. From the time you found the larger piece there, with the smaller piece stuck to it, until the time that you gave it to Mr. Wells, was there any change in its condition? A. No, sir.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Officer Abbey, you five officers with yourself were waiting in your home from about 2:30 until about 5:40? A. Yes, sir.

Q. And what were you doing during that two and a half to three hours' wait in your home, all six of you?

A. Sitting in my living room surveying the defendant's house.

Q. You weren't all six watching the defendant's house, were you? A. Five officers was. [31]

Q. You mean just glued to the window watching the defendant's house?

(Testimony of Arthur F. Abbey.)

A. They were on the chairs, and you can sit down and look directly across the road to defendant's house.

Q. What were you doing besides sitting there, if anything? A. Talking.

Q. Talking? A. Yes, sir.

Q. Did you play any cards? A. No.

Q. Drink any water?

A. Drank 'some water.

Q. Ice water?

A. I believe it was. I don't recall.

Q. Did Agent Wells drink any ice water?

A. I don't recall.

Q. Any Scotch or wine of any kind, or any kind of liquor? A. No.

Q. Not one drop? A. No.

Q. You were on duty? A. Yes.

Q. So none of you drank anything at all? [31]

A. Except water.

Q. Except water. You were in the living room all the time yourself? A. No.

Q. Where were you?

A. In the kitchen.

Q. In the kitchen doing what?

A. Went out and had a drink of water myself.

Q. Drink of water yourself. Now, you came out of your home, all six of you, sometime about 5:40; is that so? A. Approximately.

Q. And Agent Wells, you say, said something about, "He is back now"? A. Yes, sir.

(Testimony of Arthur F. Abbey.)

Q. And he left your house first?

A. Yes, sir.

Q. Your house is directly across from the defendant's house?

A. Approximately directly across.

Q. And defendant has a thick mock orange hedge fence on his front, entire front except for the opening for the driveway, and a similar tall mock orange hedge completely on the left makai side of his house as you face it; is that right?

A. It is a hedge, orange; I don't know how thick it is, not too thick. [32]

Q. You couldn't walk through it, could you?

A. I believe you could run and put yourself through, yes.

Q. You can go through it?

A. I believe so.

Q. You have lived in that house across the street from Cavness how long?

A. Approximately five or six months.

Q. Five or six months. You have seen that hedge there every day from the time you have been there; is that right? Is that right?

A. Yes, I have seen it.

Q. And you say if you pushed yourself you could push yourself through the hedge?

A. You can.

Q. In the front?

A. You can.

Q. Standing up?

A. Standing up.

Q. You know better than that.

(Testimony of Arthur F. Abbey.)

Mr. Miho: Withdraw the question.

Q. (By Mr. Miho): Can you dive through it? Can you dive through that front hedge?

A. I said you can go through it.

Q. Can you dive through it and come up standing on the [33] other side?

Mr. Hoddick: Objection. I think this calls for a conclusion this witness is not qualified to give.

Mr. Miho: He is qualified. He knows the fence.

Mr. Hoddick: They are merely looking at a hedge. That is hardly enough for a witness to determine whether he could dive through it. I don't think it has a material bearing.

The Court: Overruled.

Mr. Miho: Answer the question.

The Witness: Your Honor, he asked me the question "diving through it." I don't know what he means by "diving through."

The Court: He doesn't understand the question.

Q. (By Mr. Miho): You don't understand the question? A. No, sir.

Q. From where your house is can you run across the street, Leahi Avenue, and dive through that front hedge at any point and come through?

A. Well, diving, I thought like you dive in water, head first.

Q. Head first into the hedge. Can you do such a thing? A. Not head first.

Q. Not head first. You wouldn't dive through that hedge [34] fence yourself?

(Testimony of Arthur F. Abbey.)

A. Wouldn't head first.

Q. What?

A. You couldn't do it with your head first.

Q. Now, you were the last to come to the scene; is that right? A. Right.

Q. And, Officer Abbey, you were about eight to ten feet behind Mr. Wells as Mr. Wells entered into the defendant's driveway? A. No.

Q. What is that?

A. I was further distance than that.

Q. Further distance than that. You were in the middle of Leahi Avenue; is that right?

A. If I recall, approximately.

Q. Approximately in the middle.

Mr. Hoddick: When, Mr. Miho?

Mr. Miho: Will you let me finish, Mr. Hoddick.

Q. (Continuing): And at that time Agent Wells was almost up to the defendant? A. No.

Q. Is that right?

A. He was standing next to the defendant.

Q. He was standing by the defendant's left front door? [35]

A. Standing next—the door was open. He was standing next to him.

Q. And the door was open?

The Court: Automobile door?

The Witness: Automobile door.

Mr. Miho: I beg your pardon?

The Court: So we will all remember, it was the automobile door.

(Testimony of Arthur F. Abbey.)

Mr. Miho: Yes, the automobile door. Is that right?

The Witness: Right.

Q. (By Mr. Miho): The automobile was how far in the driveway of the defendant, Mr. Abbey?

A. About the middle of his driveway. I don't recall the distance.

Q. That driveway is about seven feet or eight feet wide. It is a very narrow driveway; isn't that so? A. I don't know.

Q. You don't know. You have a driveway in your yard. How wide is that? Three feet?

A. I don't know.

Q. You don't know. How wide is a car? By the way, do you think you can answer that better today? A. Approximately five feet.

Q. Five feet. [36]

The Court: Wait a minute. "Better today." I know what you are talking about, but I told you both the other day to remember that evidence taken on the motion is not part of this record as to the trial. Now the jury doesn't know what you mean by "better today." That is stricken, and you start all over again.

Mr. Miho: I believe, if your Honor please, to get that point straight, in cross-examination of a witness, what he has testified to under oath on a motion or for any other purpose, if it is contradictory, is admissible in questioning during cross-examination, your Honor.

(Testimony of Arthur F. Abbey.)

The Court: But standing alone, unless you elaborate on the "better today," it doesn't mean anything to the jury.

Mr. Miho: Yes, I may not have elaborated my question enough, but I just wanted to have an understanding, if your Honor please, as to that.

The Court: Yes, you can impeach him.

Mr. Miho: If here he says anything contradictory to what he has stated during a hearing on a motion, I have a perfect right to examine him on that.

The Court: If it is material, yes, but I want you to remember the jury has to follow, too. They can't follow with reference to something they know nothing about. That is stricken and you start over again.

Q. (By Mr. Miho): Do you know how wide a car is? [37] A. Approximately five feet.

Q. Five feet. You thought a car was three feet wide the other day; isn't that true?

A. I measured it since then.

Q. You have measured it since that time. Have you measured how long a car is since the last hearing? A. What car are you talking about?

Q. Let's say your car. What kind of a car do you have? A. '38 Chevrolet.

Q. How long is that?

A. Approximately 16 to 17 feet.

Q. You thought it was 7 feet the other day, didn't you?

(Testimony of Arthur F. Abbey.)

Mr. Miho: Well, I withdraw the question.

Q. (By Mr. Miho): Mr. Abbey, so you stood in the middle of Leahi Avenue at the time Agent Wells was up to the defendant's car and his left front door was partially open?

A. What was that question?

Q. You were the last to leave the house and you were in the middle of Leahi Avenue. I am trying to get the distance from where you were at the time you saw the defendant being approached by Mr. Wells. That is my purpose. You were, you say, at about the middle of Leahi Avenue at the time Agent Wells, who was the first to come up to the defendant, was by the defendant's front left door of his automobile; right? [38]

A. No, sir. I said he was standing by the defendant with the left front door open.

Q. Who had the left front door open? Agent Wells had his right hand on it, or defendant opened it himself with his left hand?

A. The door was open.

Q. You don't know who opened it?

A. No.

Q. You didn't see anybody's hand on the left front door? A. No.

Q. You didn't see that. Didn't you see defendant's hand on the front door handle?

A. No.

Q. Couldn't you see that from where you were standing? A. The door was wide open.

Q. How wide open?

(Testimony of Arthur F. Abbey.)

A Just as far as the door would open up.

Q. You mean the door was completely open?

A. Yes.

Q. When you first saw Mr. Wells up to the defendant's car, the door was completely open?

A. Yes.

Q. Well, then, Mr. Wells was facing the defendant in an open space; is that right? Or near him, near the defendant?

A. He was near the defendant. [39]

Q. He was near the defendant. The door was not in between Mr. Wells and the defendant then?

A. No.

The Court: Excuse me. Let's take our first recess at this time.

(Recess had.)

Q. (By Mr. Miho): Mr. Abbey, you were the last to arrive at the scene; right? A. Right.

Q. About how far would you say you were from Mr. Wells to where you were at the time you saw Mr. Wells come up to the defendant's car?

A. What was that again, the question?

Q. From where you are sitting how far were you from Mr. Wells when Mr. Wells first reached the defendant, the defendant being on his left front seat?

A. Well, he was standing when I first saw Agent Wells.

Q. When you first saw the defendant—forgetting the prior question of mine—when you first saw the defendant, the defendant was already standing

(Testimony of Arthur F. Abbey.)

up outside of his car; is that what you are trying to tell us? A. No.

Q. What was the defendant doing when you first saw the defendant, if anything?

A. He was sitting in his car. [40]

Q. He was still sitting in his car?

A. With his leg half out like he was going to step out of the car.

Q. Just as if he was going to step out of the car? A. That's right.

Q. You could see the left front door, couldn't you? A. Right.

Q. In what position was the left front door at that time? A. Wide open.

Q. All the way open? A. Open.

Q. So that the first time you saw the left front door, it was all the way open? A. Right.

Q. Now at that time was the defendant's hand on any part of that left front door?

A. I don't recall.

Q. You don't recall? Well, he might have had his left hand on some part of that left front door, mightn't he?

He might have had his left hand on some part of that left front door; is that right?

A. I don't recall.

Q. But I am asking you whether defendant might have. Try to think. [41]

The Court: Wait a minute. There are two different questions. "Might have," and then you say, "might recollect."

(Testimony of Arthur F. Abbey.)

Mr. Miho: I will reframe the question.

Q. (By Mr. Miho): Do you recollect, Officer Abbey, that the defendant had his left hand about that time on some part of the left front door?

A. I don't recall.

Q. You don't recall at all. He might have, though; is that right?

A. I could not say. The door was wide open.

Q. You saw his left foot, the defendant's left foot; you saw that?

A. I saw his left leg.

Q. Left leg. And that was out of the car, or partially out of the car?

A. Well, I wouldn't say partial. Just like a Hudson, at the time, the car the defendant was driving was low.

Q. I know it is low, but was his left foot touching the ground or not then? A. No.

Q. Was it hanging out of his car, or was it on the running board?

A. They don't have a running board.

Q. Well, where was his left foot?

A. Just like you were sitting in a chair and you turned [42] around and were going to get up. It was not out of the car and it was not on the running board. His leg was like an attempt to be made to step out of the car.

Q. You could see that from where you were standing? A. I was not standing.

Q. You weren't running?

A. More or less.

(Testimony of Arthur F. Abbey.)

Q. You told us, didn't you, the other day that it was half way between a running and a walk?

A. Right.

Q. And you were still on Leahi Avenue; that is the road fronting your house and the defendant's house?

A. Right.

Q. And how far were you at that point from the defendant, approximately, from where he was sitting? As far as the railing here, the first row of seats, the second row of seats, the third row of seats, or the wall?

A. I would say approximately, about 10 feet.

Q. You say 10 feet? A. Approximately.

Q. Now is my recollection correct that you stated under oath here the other day that at that point or some point near there at that time you were approximately 20 feet away from the defendant and Mr. Wells?

A. I don't recall. [43]

Q. You don't recall that. Do you remember my standing here some place and pointing out a position to you and you said that was about it, and we stipulated that was about 20 feet?

A. I don't recall that.

Q. You won't deny you guessed it was 20 feet at that time, would you?

A. What is the question?

Q. You would not deny you said the other day you thought you were about 20 feet away from the defendant and Mr. Wells, would you?

A. I don't recall it.

Q. You don't recall. But you were on Leahi Avenue; that is certain?

(Testimony of Arthur F. Abbey.)

A. Part of Leahi Avenue.

Q. And what was Mr. Wells doing at that time?

A. The door was wide open. He was standing near to the defendant with a paper in his right hand, and his other hand like this (indicating), and the defendant pushed it.

Q. Show us again how the defendant pushed Mr. Wells.

A. (Indicating.)

Q. Once more just to make sure.

A. (Indicating.)

Q. Just pushed him like that; is that right?

A. Pushed like that (indicating).

Q. What part of Mr. Wells' body? [44]

A. Up this part of his chest (indicating).

Q. And then Mr. Wells grabbed onto his left arm at the same time?

A. I don't recall where he grabbed.

Q. What is that? A. I don't recall.

Q. You said something about Mr. Wells grabbing onto him and hanging onto him from the beginning to the end of the struggle, didn't you?

A. The other officers, when Agent Wells staggered back after the push, grabbed him.

Q. What other officer grabbed the defendant?

A. I don't recall which officer it was. There were five of us.

Q. You kept on going to this place, didn't you? You kept on going to Mr. Wells and the defendant, didn't you?

A. I was coming to the scene, yes.

Q. That was your purpose, to go to the scene;

(Testimony of Arthur F. Abbey.)

isn't that right? A. Right.

Q. And yet you don't recall what other officer grabbed hold of the defendant? A. No.

Q. You don't recall that at all? A. No.

Q. But you are sure somebody else other than Mr. Wells grabbed the defendant at that point?

A. Right.

Q. Well, what other officer was there ahead of you near Mr. Wells and the defendant at that point?

A. I don't recall.

Q. You don't recall. Well, how many officers were there? A. Five besides me.

Q. Five besides you. At that point; right?

A. I don't know whether it was at that point. It was all around.

Q. The five officers were all near the defendant and Mr. Wells; is that right?

A. I don't recall.

Q. You don't recall. Was there anything to obstruct your view from where they were, Mr. Wells and the officers and the defendant were, and from where you were walking? A. No.

Q. The hedge didn't get in your way?

A. No.

Q. The hedge at the back of the car?

A. No.

Q. You are sure of that? A. Positive.

Q. The hedge is how tall?

A. I don't know.

Q. Taller than you, isn't it?

A. I couldn't say.

Q. You don't know? A. I don't know.

(Testimony of Arthur F. Abbey.)

Q. There are two coconut trees in the yard, aren't there, where the struggle took place?

A. Yes.

Q. The fact that you don't recall is because the coconut tree, the back of the Hudson car of the defendant, and the front hedge got in your way; isn't that right?

A. No.

Q. You were able to see everything? Nothing was in your way? Your line of vision was not obstructed at any time?

Mr. Hoddick: Objection. The question is too indefinite. "You were able to see everything."

The Court: Overruled.

Q. (By Mr. Miho): Will you answer the question?

A. What was the question again?

Q. There was nothing to obstruct your view from where you were proceeding to the scene and where something was taking place near the left front of his car; there was nothing to obstruct your view then, from what you have just told us?

A. At the time Agent Wells was talking to the defendant, [47] no.

Q. What about after that until you got to the scene, did anything come to obstruct your view?

A. After the officers grabbed the defendant to assist Agent Wells, we was all around him.

Q. But you saw everything, didn't you?

A. What do you mean, I saw everything?

Q. Who was around the defendant and who was with Mr. Wells and who was doing what?

A. Not after the struggle, I didn't pay any attention.

(Testimony of Arthur F. Abbey.)

Q. You didn't pay any attention. Then you kept on going to the struggle, though after the struggle you didn't pay any attention, but you kept on going to the struggle; isn't that right?

A. After the defendant pushed Agent Wells, I kept going to the struggle, yes.

Q. And what was the first thing you did?

A. Grabbed the defendant's leg.

Q. Grabbed the defendant's leg? A. Yes.

Q. Is that the time the defendant fell down?

A. It was shortly after he fell; I don't recall what time it was.

Q. Before you went up to grab his leg, did you see the defendant fall down at any time? [48]

A. No.

Q. You never saw him fall down? A. No.

Q. You are sure of that? A. Sure.

Q. And you had the defendant in a clear view to you, though; isn't that right? 'The defendant was clearly in your view all the time, though; isn't that right?

A. It was a good deal clearer when I first saw Agent Wells approach him.

Q. You never saw the defendant fall down up to the time you grabbed his leg? A. Right.

Q. You are sure of that? A. Right.

Q. You grabbed his leg and the defendant fell down, you say? A. Yes.

Q. And who else was hanging onto the defendant at that time?

A. The rest of the five officers.

(Testimony of Arthur F. Abbey.)

Q. All five of you were hanging onto the defendant; is that right? A. All six of us.

Q. All six of you. Did you see Officer Shaffer grab [49] hold of the defendant's leg from behind?

A. No.

Q. You never saw that? A. No.

Q. Did you see someone hit the back of the defendant at any time? A. No.

Q. You didn't see the defendant fall down and hit any object at any time, did you?

A. No, I don't recall.

Q. What was Shaffer doing?

A. I don't recall.

Q. You don't recall. What was Mr. Wells doing?

A. I don't recall. We all had hold of his body. He was trying to struggle to get away. I don't know who had who or whereabouts on his waist. I know I had him around the leg.

Q. You had him around which leg?

A. Left leg.

Q. And which direction was the defendant facing at that time, if you can tell us?

A. I believe he was facing Diamond Head.

Q. Diamond Head. So that if I were the defendant, facing Diamond Head, you came this way and grabbed hold of my left leg? [50]

A. No.

Q. Is that right? A. No.

Q. Was I facing this way (indicating) then? The defendant was facing this way (indicating) and the car this way (indicating)?

(Testimony of Arthur F. Abbey.)

A. His car was facing Ewa. He got out on the Diamond Head Side of his car.

Q. This way you mean (indicating)?

A. May I show you?

Q. Yes, come on, show us. We will put the car right in front of the jurymen, the front of the car being there (indicating). Do you understand, this is the front of the car,

A. Mr. Miho, may I change the chair. This is my property over here. The car was facing this way.

Mr. Miho: It will be clearer to the jury, if your Honor please——

The Court: Well, let the witness illustrate.

The Witness: He was sitting in his car, and got up out of his car, was standing like this (indicating), and I grabbed his left leg.

Q. (By Mr. Miho): He was just about a foot or two feet away from his car?

A. I don't recall how many feet.

Q. He was pretty close to the car anyway; is that right? [51]

A. I can't answer that, how close he was.

Q. Was the door in front of the defendant like this (indicating), then, all the way open, at right angles, more or less, his front door?

A. The door was open.

Q. Wide open?

A. The car door opens to the front.

Q. So the door was open this way (indicating)? Cavness, stand up—do it again. How was Cavness standing up? Like this (indicating)?

(Testimony of Arthur F. Abbey.)

A. (Indicating.)

Q. The door was open this way (indicating)?

A. Yes.

Q. Where was Wells?

A. I don't recall where he was at the time I grabbed him by the leg. The other officers were struggling.

Q. Where were the other officers?

A. I don't recall.

Q. There were six of you, you said. Where were the other five?

A. The defendant was sitting like that (indicating); after he pushed Agent Wells, he got up and the other officers grabbed him.

Q. The five officers were all around him like this (indicating). Here was a door and the other officers were all [52] around, hanging onto him, grabbing hold of him; is that what you are trying to tell us?

A. Where they were standing before he pushed Agent Wells, I don't recall.

Q. Well, when you grabbed hold of defendant's left leg, who was hanging onto his left arm?

A. I don't recall.

Q. Was anyone hanging onto his left arm?

A. I don't recall.

Q. Was anyone hanging onto his right arm?

A. I don't recall.

Q. Anyone hanging onto his body?

A. The other five officers had hold of him.

Q. Completely?

A. I don't know completely.

(Testimony of Arthur F. Abbey.)

Q. Was anyone hanging onto the back of his head? A. I don't recall.

The Court: You had better come back here so we can hear.

(Witness resumes stand.)

Q. (By Mr. Miho): At that point, Mr. Abbey, did you see any bleeding on the back of the defendant's head? A. I don't recall.

Q. Did you touch or see any blood on you?

A. No. [53]

Q. Did you have any blood on your body, any parts of your body, or your clothing at any time?

A. No.

Q. You didn't. Were you able to observe the defendant's face at that time?

A. After he fell, the first time he got up, yes.

Q. Tell us what you saw on his face.

A. He had his hand up there and his lip—by his face. His lip was all bleeding, a little bit here on his lip. (Indicating.)

Q. Do that again.

A. He had his hand here (indicating) and I noticed blood on his lip.

Q. Are you sure it was his left hand as you demonstrated?

A. I don't recall what hand.

Q. But he had one hand on his lip?

A. He had one hand like this (indicating) with his fist closed.

Q. And it was bleeding at that time?

(Testimony of Arthur F. Abbey.)

A. Yes.

Q. And his fist was still closed?

A. Right.

Q. That was when he got up the first time he fell down? A. Right.

Q. Still you didn't see any bleeding on the back of his head? [54] A. No.

Q. Did you see any black and blue marks, abrasions, below his right eye, contusions—Do you know what "contusion" means? A. Abrasions.

Q. Did you see any contusions of the right eye at that time? A. No, I didn't notice any.

Q. And the cheek? A. I didn't notice.

Q. You didn't notice? A. I didn't notice.

Q. And you didn't notice any laceration of his scalp? A. No.

Q. You didn't notice any lacerations of his upper lip?

A. The only one I noticed was his lower lip, the one.

Q. Did you see any contusions of his right eye at any time, bruises on his right eye at any time?

A. No.

Q. You never saw it? A. No.

Q. You took a good look at the defendant many times, though; is that right, both during and after the struggle?

A. What do you call a "good look"?

Q. Close up to him, right close up to him, three or [55] four feet, two feet maybe.

(Testimony of Arthur F. Abbey.)

A. I didn't pay any attention.

Q. You don't recall that either? A. No.

Q. Would you deny that he had an open scalp in the back, bruises on his right cheek, and contusions of his right eye? Would you deny that?

A. No.

Q. You wouldn't deny it? A. No.

Q. He might have been injured that way in the face? A. Yes.

Q. Did you see whether he had any bruises—Did you notice any kind of marks on his hands?

A. No.

Q. You didn't by any chance see anyone kick his face, did you? A. No.

Q. You didn't by any chance see anyone give the old-fashioned knee hold on him, did you?

A. No.

Q. You didn't see anybody punch him on the face, did you? A. No.

Q. All you know is that he was being subdued, you [56] grabbed hold of his left leg, he kind of fell down, he got up again, at that time he showed a little bleeding on his lips?

A. He fell down, he got up, I noticed the bleeding on his lip.

Q. How many times did he fall down in your presence? A. Two or three times.

Q. Two or three times. And during all that time you were hanging onto his left leg? A. No.

Q. Where were you hanging on when he got up the second time?

(Testimony of Arthur F. Abbey.)

A. The first time I grabbed his leg he kicked me loose. He fell down. The second time he fell down again I had hold of his leg.

Q. What is that?

A. The second time he fell down again I had hold of his leg.

Q. Had hold of his leg? A. Yes, sir.

Q. Had hold of his leg? A. Yes.

Q. And then?

A. The third time I believe he went down I didn't have hold of him.

Q. You didn't have hold of him? [57]

A. No.

Q. What were you doing?

A. Getting up off the ground.

Q. Then what did you do?

A. That is when Captain Whitford asked me to help him open up his right hand.

Q. What did you do?

A. I tried to open it up by using force, and I couldn't. He asked me to hit him with a blackjack on the back of his hand to force his hand open.

Q. What was the position of the defendant's body when Captain Whitford told you to use a blackjack on his hand?

A. He was in a prone position, face down.

Q. Hands outstretched?

A. Head down and hands like this (indicating).

Q. Like this (indicating)? A. Right.

Q. All right. And at that point where were you

(Testimony of Arthur F. Abbey.)

standing? When he was down like that, where were you standing?

A. I was trying to open his hand.

Q. Wasn't it open already? A. No.

Q. When he was down like this (indicating)?

A. He was laying like this (indicating).

Q. Not like this (indicating)? [58]

A. No.

Q. Like this (indicating). Where were you standing at that time?

A. Captain Whitford asked me to open his hand at that time.

Q. Where were you standing with relation to the defendant's body? A. Right side.

Q. And Captain Whitford was on which side of the defendant's body? A. Right side.

Q. You were standing, both of you, by his right arm?

A. I don't recall where I was standing. He asked me to open his hand.

Q. Don't recall on what side of his body you were standing?

A. I was on his right side.

Q. You are sure of that? A. Yes.

Q. On your knees or squatting like this (indicating)?

A. When I was opening his hand I was.

Q. What were you doing?

A. Trying to open his right hand.

Q. You couldn't open it? A. No. [59]

Q. Who had hold of his right arm?

(Testimony of Arthur F. Abbey.)

A. Captain Whitford.

Q. Where was he? In front of you?

A. He was not directly in front of me, practically on the side when he called me to open his right hand.

Q. Captain Whitford had hold of the defendant's right hand? A. Right wrist.

Q. Demonstrate it to me from where you are sitting, if this is the defendant's right wrist.

A. Like this (indicating).

Q. Captain Whitford had it like that?

A. Yes.

Q. Do it again.

A. (Indicating) Like that. Similar to this position (indicating). I don't recall. He had the lower part of his forearm.

Q. And you were squatting behind Captain Whitford? A. No, right side of him.

Q. On this side (indicating)? A. Yes.

Q. And then he told you to do what?

A. To open his hand.

Q. With a what?

A. He asked me to open his hand, and I tried to open [60] it like this (indicating) and I couldn't do it, so he asked me to hit him with a blackjack. I tapped him lightly, and it opened, and Captain Whitford removed a Vicks inhaler, part of it, and shattered pieces.

Q. At that point where was your blackjack?

A. What was that?

(Testimony of Arthur F. Abbey.)

Q. Where did you keep this blackjack ordinarily? A. My hip pocket.

Q. Right hip pocket? A. Right.

Q. You can take it off right away?

A. Right.

Q. Do you have it with you by any chance?

A. No.

Q. You didn't bring it today? A. No.

Q. What is inside a blackjack?

A. I didn't examine one. I don't know.

Q. You don't know. So you used that blackjack to tap the defendant's right wrist; is that right?

A. His right hand, back of his hand.

Q. And then it opened? A. Right.

Q. And then these four pieces came out?

A. I don't recall how many pieces came out.

Q. Well, what came out of his right hand?

A. Part of a Vicks inhaler tube.

Q. What part of a Vicks inhaler tube? What part?

A. I don't recall what part of it.

Q. Well, isn't that what you were trying to get, holding onto his hand; is that what all the struggling was about? A. Right.

Q. And you don't know what came out of his hand after all that struggling and use of the blackjack?

A. I said part of a Vicks inhaler tube.

Q. I am asking you what part of the Vicks inhaler tube. You didn't see anything come out of his right hand? A. I did see.

(Testimony of Arthur F. Abbey.)

Q. What did you see?

A. Part of a Vicks inhaler tube.

Q. What part? A. Part of it.

Q. What part? A. I don't recall.

Q. But his hand came open after you used a blackjack; his hand came open; right?

A. Partly open. Captain Whitford removed part of the Vicks inhaler tube out of his hand.

Q. And you don't know what part he removed?

A. No.

Q. And Captain Whitford removed something out of his [62] right hand? A. Right.

Q. You say it was a Vicks inhaler part?

A. Right.

Q. Big parts or small parts, or how many parts?

A. There was quite large parts; I noticed them.

Q. Didn't he show it to you: "Here is the stuff," or something like that?

A. As he took them out of his hand, I noticed it.

Q. He took it out of his hand this way (indicating)?

A. His hand was open; he picked it up.

Q. Show again. Demonstrate.

A. Like that (indicating).

Q. Whitford took it out like that?

A. Yes.

Q. Didn't he show it to you?

A. Not at the time. I don't recall.

Q. Did he show it to you at any time later?

(Testimony of Arthur F. Abbey.)

A. Yes.

Q. Where? A. At the police station.

Q. Then you knew what came out of his right hand?

A. Part of a Vicks inhaler tube.

Q. What part, then? What part, then? Tell us.

A. Well, part of it. I can't describe what part of it. [63] It was shattered.

Q. You don't know what came out of his right hand, if anything; isn't that right? A. No.

Mr. Hoddick: Objected to as argumentative.

The Court: Overruled.

Q. (By Mr. Miho): You don't know, do you?

A. It was a part of a Vicks inhaler tube.

Q. Since you cannot tell us what part it is, I am asking you that you don't know what actually, if anything, came out of his right hand; isn't that right? A. No.

Q. The answer is "yes"; isn't that right?

A. I said part of a Vicks inhaler tube.

Q. Still you don't know what part came out of it; is that right?

A. It was shattered pieces.

Q. And then what did you do?

A. Agent Wells asked me to open up his left hand.

Q. Did you use a blackjack to open up his left hand? A. I did.

Q. And who was hanging onto his left hand?

A. Agent Wells.

(Testimony of Arthur F. Abbey.)

Q. Hanging onto his left arm?

A. Yes. [64]

Q. Left wrist just like Officer Whitford?

A. Similar to Captain Whitford had.

Q. Show.

A. Had the lower part of his left wrist like this (indicating).

Q. Do it again.

A. I don't know exactly how he had it, but in this fashion (indicating).

Q. That is when the defendant was prone, down flat on his stomach?

A. He was on his stomach.

Q. Where was Shaffer?

A. I don't know.

Q. And how did you use the blackjack on him. Did you come over to the left side of the defendant?

A. I tried to open his hand first and then Agent Wells told me to hit him on the back with a blackjack.

Q. You were still on the right side?

A. When Agent Wells asked me to open up his left hand, I came over on that side.

Q. You jumped over the defendant's body?

A. I don't recall how I got over there. I was over there.

Q. You used a blackjack to open his left wrist?

A. After I tried to open it. [65]

Q. You couldn't open it with both your hands?

A. No.

(Testimony of Arthur F. Abbey.)

Q. You tried with both hands?

A. I don't recall. I used my hands.

Q. You used your hands, but you couldn't open the defendant's wrist? A. No.

Q. So you used the blackjack? A. Yes.

Q. And did his left hand open? A. Yes.

Q. And what came out of his left hand?

A. A small object.

Q. What object?

A. This object (indicating).

Q. This is what came out?

A. There was an object fell from his hand, and after he says take him in the house. I handcuffed him and I went back to where this fell, and picked it up.

Q. Mr. Abbey, you said——

The Court: Nobody has marked it for identification. All I know is that it came out of a small envelope we were talking about prior to the recess.

Q. (By Mr. Miho): Anyway, something like that came out of his left hand? [66]

A. An object fell out of his left hand.

Q. You don't want to say exactly whether this came out of his left hand?

A. I didn't notice.

The Court: What?

The Witness: I didn't notice. There was an object that fell.

Q. (By Mr. Miho): You are not so sure now, are you, whether this actually came out of his left hand or not; you are not so sure? A. No.

(Testimony of Arthur F. Abbey.)

Q. But you said a while ago, pointing at this thing here: This thing fell out.

A. I said an object fell out. I picked this up.

Q. I didn't understand you to say you picked this up from his left hand.

A. I picked it up from the ground.

Q. Later on? A. Yes, sir.

Q. But you saw something come out of his left hand? A. Yes.

Q. And Agent Wells was hanging onto his left hand at that time? A. Yes.

Q. Did you see Agent Wells pick up anything at that time [67] from his left hand, like Captain Whitford did from the right hand of the defendant? A. No.

Q. You didn't see Agent Wells pick up anything; is that right? A. No.

Q. But you are sure something fell out of his left hand? A. Yes.

Q. And nobody picked it up when it came out of his left hand? A. No.

Q. Mr. Abbey, you never saw the defendant hit anybody at any time except for the first push of Agent Wells; is that right?

A. And he was struggling after we was trying to subdue him.

Q. I am asking you if you saw the defendant Cavness hit any of you six officers at any time during this struggle. You know what I mean by "hit," don't you? A. Haul out and strike him.

(Testimony of Arthur F. Abbey.)

Q. Yes. A. No.

Q. All he was trying to do was get up and get away from people; is that right?

A. If I recall. [68]

Q. Now, can you tell us how many times you saw the defendant fall down?

A. Two or three times.

Q. What is that? A. Two or three.

Q. Two or three times. Now, after you opened the defendant's left hand with your blackjack, then tell us what happened?

A. He says, "Take me in the house." I immediately handcuffed him.

Q. You handcuffed him while he was still flat on his stomach; is that right?

A. I don't recall whether he was on his stomach or standing up.

Q. You don't recall? A. No.

Q. But you handcuffed him? A. Yes.

Q. So the struggle, as you call it, ceased after his left hand was opened by you with a blackjack? A. Yes.

Q. That was the end of everything so far as the struggle was concerned? A. Yes.

Q. Did you see any bleeding from the back of his head [69] at that time? A. No.

Q. Tell us how you handcuffed him, what position you handcuffed the defendant.

A. Around his back.

Q. Then you must have gone to his back?

(Testimony of Arthur F. Abbey.)

A. Yes.

Q. You grabbed both his hands and handcuffed them together?

A. His hands were behind his back.

Q. And you are sure you were the one who handcuffed the defendant? A. Yes.

Q. Still you didn't see any bleeding from the back of the defendant's head?

A. I didn't notice none.

Q. And then you took him to the house?

A. No.

Q. Who took him to the house?

A. I don't recall.

Q. Didn't you go up to the house?

A. Not at that time.

Q. Did all of you six officers go up to the house with the defendant? A. No. [70]

Q. What did you do?

A. I stayed there in the yard, went back to the base of the tree to see what fell from his hand.

Q. And then that is when you found this piece you indicated you saw on that table?

A. Yes, sir.

Q. Then you called Agent Wells?

A. Yes.

Q. And he came running out? A. Yes.

Q. And then you put it back on the ground again? A. Yes.

Q. You told him, "This is where I found this stuff"?

(Testimony of Arthur F. Abbey.)

A. I don't recall that that was the words.

Q. Well, something like that; is that right?

A. Yes.

Q. And then he told you, "Well, put it in your pocket and give it to me at the vice squad," or words to that effect? A. Yes.

Q. So you put it in what pocket?

A. My left pocket of my pants.

Q. What?

A. If I recall, it was my left front pocket of my pants.

Q. Of your pants? [71] A. Yes.

Q. I see. You kept it there? A. Yes.

Q. You didn't by any chance use the blackjack on the defendant's head, did you? A. No.

Q. Are you positive? A. Positive.

Q. Did you see anyone else use a blackjack on the defendant's head? A. No.

Q. You stated, I believe, while you were waiting to raid the defendant's place, you said something about going to the kitchen; right? A. Yes.

Q. You went to the kitchen from the living room, your sitting room? A. Right.

Q. Where the officers were sitting?

A. Right.

Q. And you went back and forth from the sitting room to the kitchen to get water; is that right?

A. Yes.

Q. All the officers wanted to drink water?

A. I don't recall. [72]

(Testimony of Arthur F. Abbey.)

Q. Do you remember about how many times you went back to the kitchen?

A. Someone asked me if he could have a drink of water. I went out and got a glass of water and I told them to make themselves at home. I only got water one time.

Q. Ice water?

A. I don't recall whether it was ice water.

Q. Did you give them anything to eat, chew on?

A. Not that I recall. I told them to help themselves. I didn't pay no attention.

Q. How long have you been a reserve police officer, you say?

A. Approximately a year.

Q. Approximately a year? A. Right.

Q. And this raid was part of your reserve officer's duties, or was it outside of your powers of reserve officer?

A. What was the question?

Q. This raid that you took part in of the defendant's premises, was that during your hours as a reserve police officer on duty or not?

A. I was on duty.

Q. You were on duty?

Mr. Miho: That is all.

The Court: Redirect examination. [73]

(Testimony of Arthur F. Abbey.)

Redirect Examination

By Mr. Hoddick:

Q. Mr. Abbey, will you put those two pieces which you saw were formerly stuck together back in the envelope that you took them out of?

A. (Returns pieces to envelope.)

Mr. Hoddick: Your Honor, may I have that envelope marked for identification purposes.

The Court: It may be marked for identification as——

The Clerk: A-1. United States A-1, for identification.

Mr. Hoddick: And may I have the other envelope which was taken out of U. S. A, for identification purposes, also marked for identification purposes.

The Court: Yes.

The Clerk: U. S. A-2, for identification.

(Thereupon the items above referred to were marked U. S. Exhibits A-1 and A-2, for identification.)

Mr. Hoddick: May I have the Court's indulgence for a moment.

The Court: Yes.

Mr. Hoddick: No further questions.

The Court: Next witness. You are excused.

(Witness excused.) [74]

Mr. Hoddick: Mr. Carr, please.

No. 12514

United States
Court of Appeals
For the Ninth Circuit.

ORESTUS CAVNESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 331 to 622)

Appeal from the United States District Court
District of Hawaii.

FILED

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Appeal from the United States District Court
District of Hawaii.

GILBERT J. CARR

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name.

The Witness: Gilbert J. Carr.

The Court: Age?

The Witness: Forty-three.

The Court: Occupation?

The Witness: U. S. Customs Chemist.

The Court: Do you live here in Honolulu?

The Witness: Kailua.

The Court: You are a citizen of the United States?

The Witness: Yes.

The Court: Exclusively?

The Witness: Yes.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Carr, how old are you?

A. Forty-three.

Q. Did you go to college?

A. Graduated from University of Chicago, Bachelor of Science degree, major in chemistry.

Q. University of what? A. Chicago.

Q. When did you graduate from the University of Chicago?

A. 1943. Received my degree in 1943.

(Testimony of Gilbert J. Carr.)

Q. When did you first start studying for your degree? A. Oh, it was about 1927.

Q. And during that entire period in what subject did you major? A. In chemistry.

Q. Did you do any work in chemistry during that period?

A. Yes, I was working in the Government laboratory at the time.

Q. Which laboratory?

A. Bureau of Internal Revenue, Alcohol Tax Unit.

Q. What was your work there?

A. Assistant chemist, chemical laboratory.

Q. What type of work did you do?

A. Assisting the chemists in analyzing all kinds of liquors, narcotics, perfumes, alcohols.

Q. Did you familiarize yourself with the standard tests for the analysis of narcotics?

A. Yes, I did.

Q. After 1943 what did you do?

A. Well, in 1937 I was in charge in the laboratory in San Juan, Puerto Rico. In 1941 I came back to Chicago. [76]

Q. What kind of a laboratory was that?

A. Same kind of a laboratory, Alcohol Tax Unit, analyzing narcotics, perfumes. I was transferred back to Chicago in 1941 as an assistant chemist, still with the Alcohol Tax Unit, same type of work.

In 1948 I went to Oakland, California as a chemist for the United States Customs Laboratory. Cus-

(Testimony of Gilbert J. Carr.)

toms laboratories are a little more varied, all types of works, including narcotics and liquors. Then in 1949, January, I came here as chemist in charge.

Q. What type of work have you been doing here?

A. Most everything that is imported into the Islands of a chemical nature is analyzed by the laboratory. Work is also done for the various enforcement agents, including the Bureau of Narcotics of the Treasury Department.

Q. Have you analyzed narcotics in the course of your duties here in Honolulu?

A. Yes, I have.

Q. And what type of narcotics have you analyzed?

A. Practically all types, morphine, heroin, marijuana, various kinds of medicines. All suspected narcotics have to go through the entire procedure, whether they are there or not.

Q. How about the derivatives of cocoa leaves?

A. Yes, cocaine. [77]

Q. What is cocaine?

A. Cocaine is derived from the leaves of the cocoa plant.

Q. Do you know the process by which it is derived? A. No, I don't.

Q. What is the test used by chemists in analyzing cocaine?

A. There is one specific test used, chloroplatinic acid, that gives characteristic crystals under the microscope, which can be identified. No other substance up to this particular time gives identically the same crystals.

(Testimony of Gilbert J. Carr.)

Q. Have you ever analyzed any narcotics or any substances for Mr. Wells? A. Yes, I have.

Q. And have you done that during the past year?

A. Yes, I have.

Q. Did you receive any substance from Mr. Wells for analysis on July 22, 1949?

A. On July 22 I received a package from Mr. Wells.

Q. What did that package contain?

A. One package consisting of six capsules. Then there was one looked like the top of a Vicks Vapo-Rub inhaler that had, seemed to be two little capsules adhering to the top. They contained cocaine hydrochloride..

The Court: Just a moment. [78]

Mr. Miho: I didn't get the last answer.

The Reporter (Reading): "They contained cocaine hydrochloride."

Q. (By Mr. Hoddick): What do you mean by that?

A. All of the capsules. I took six capsules. They were weighed and then I think I took two of those capsules at random. Yes, I took two of those capsules and examined those quantitatively. But I took one of the capsules at random and examined to see if it were cocaine. Also that little top from the Vicks inhaler, I scraped a little bit off and examined that qualitatively and scraped a little off and examined that with chloroplatinic acid.

Q. How?

(Testimony of Gilbert J. Carr.)

A. With a little knife. You only need a very small quantity.

Q. To get the part do you have to break the capsules?

A. Oh, yes, you have to break the capsule, or open a capsule. I don't know whether these came apart easily or if I broke them. I have forgotten now.

Q. Did you make any written record anywhere of exactly what you did in this test, which capsules you tested?

A. No, that is all routine testing during standard tests we use. The samples were all initialed which I tested.

Q. How did you return—Did you return these articles to Mr. Wells [79]

A. Yes, they were returned to Mr. Wells on July 25.

Q. And how did you return them to him?

A. They were in a sealed envelope.

The Court: Before we identify these envelopes, as you appear to be about to do, let's take our second recess.

(Recess had.)

The Court: The jury is present as is the defendant. You may continue.

Mr. Miho: If your Honor please, at this time I would like to object. I didn't want to interrupt a while ago. I would like to object to this witness' reading from whatever he is reading from unless

(Testimony of Gilbert J. Carr.)

it can be shown it is something pertinent to this issue.

The Court: Have you been reading from something?

Mr. Miho: He made a statement he made no written record of his investigations at the laboratory.

Mr. Hoddick: Excuse me. That is not what the statement was. He said he did not make a record of the exact manner in which the capsules, and so on, were returned to Mr. Wells.

The Court: Well, there is an objection pending.

Mr. Hoddick: I will endeavor, your Honor, if I may, to establish a foundation for the use of this record.

The Court: All right.

Q. (By Mr. Hoddick): Mr. Carr, did you make a report of your analysis? [80]

A. Yes, I did.

Q. And did you describe therein what you had analyzed? A. Yes, I did.

Q. And do you have that report with you?

A. Yes. It is a standard record. Every sample that comes in the laboratory, record is made of that sample.

The Court: That is what you have in your hand?

The Witness: Yes, a record is made of that sample; a record of analysis or some pertinent information is put on that card. We receive hundreds and hundreds of samples. I can't remember for the particular one. I must keep some record.

(Testimony of Gilbert J. Carr.)

Q. Mr. Carr, on July 22, 1949, did you receive any other substances from Mr. Wells for analysis other than these six capsules, two of which were adhered to what looked like a top of a Vicks inhaler tube?

A. This card shows only that he brought in this one particular package.

Q. On that day? A. On that day, yes.

Q. How many capsules did he bring in?

A. There were six capsules, and then this little—looked like the top of an inhaler, and it looked like two capsules adhering to that top.

Q. That would make eight capsules altogether?

A. That would make eight capsules altogether.

Q. When you returned these capsules and what looked like the top of a Vicks inhaler tube to Mr. Wells, in what form did you return them?

A. The capsules which I used, or the powder which I used, the empty containers I put back in the same envelope. All the packages were sealed and my initials are on the packages.

Q. You spoke of six capsules which you received? A. That's right.

Q. Did they go in one envelope?

A. I don't remember.

Q. You say you put your initials on the envelopes? A. That's right.

Q. I show you Exhibits A-1, for identification purposes, and A-2, for identification purposes, and ask you if your initials appear thereon.

A. Yes, they do. And also laboratory number.

(Testimony of Gilbert J. Carr.)

Q. What are your initials? A. G. J. C.

The Court: And also what?

The Witness: Also the laboratory number.

Q. (By Mr. Hoddick): And where did you write those initials on these?

A. Right at the top of each envelope. [82]

Q. Across the fold? A. That's right.

Q. And what is the laboratory number that you put on here?

A. One is 200 and one is 201; 200 is the six capsules; 201 is the two adhering to this, looked like a Vicks inhaler top.

Q. And what did you do with these two envelopes?

A. I sealed them and gave them back to Mr. Wells on July 25.

Q. Did you put them in any other kind of a container?

A. I think I put them in another envelope and sealed that. I don't remember. I have no record here.

Q. I show you United States Exhibit A, for identification purposes, and ask you if your initials appear on it. A. Yes, they do.

The Court: What?

The Witness: Yes, they do. I probably put them back in this envelope and sealed this also. My initials are on here.

Q. You did seal this envelope? A. Yes.

Q. Now, you testified that the samples which you took from those six capsules contained cocaine

(Testimony of Gilbert J. Carr.)

hydrochloride. A. That's right.

Q. How did you determine that? [83]

A. With—first we test for an alkaloid with
Mayers.

Mr. Miho: What is that again?

The Witness: Mayers. And Wagners. And they
showed the presence of a narcotic.

The Court: Excuse me. Would you go over that
again. What have those two names got to do with
what you did?

The Witness: To determine first if it is a nar-
cotic.

The Court: So you did what?

The Witness: These two reagents will tell me
immediately if there is a narcotic present.

The Court: Reagents?

The Witness: That is right.

The Court: Mayers?

The Witness: Mayers and Wagners.

Q. (By Mr. Hoddick): When you use those
two reagents, does that reveal what type of narcotic
is there?

A. No, that just reveals whether the narcotic is
present. In this case, of course, those two reagents
were positive.

Q. And what did you do to tell the type of
narcotic?

A. Then to determine whether it is morphine
or some other type, several other reagents are used.
In this case the ones for morphine were negative,
showing no morphine alkaloids [84] present.

(Testimony of Gilbert J. Carr.)

Chloroplatinic acid is used for cocaine. In this case that was positive, which is specific for cocaine.

Q. What do you mean when you say "specific for cocaine"?

A. There is no other substance up to this time that I know of that gives exactly the same type of crystals for that particular reagent, that gives crystals which are identified under the microscope.

Q. Did you perform these same tests on the part which you took from the two capsules that were stuck to the Vicks inhaler tube?

A. Yes, I did.

Q. With the same results?

A. Same results.

Q. When did you return the capsules, that part of the Vicks inhaler tube, and whatever residue was left from your tests to Mr. Wells?

A. Oh, on July 25.

Q. I ask you to examine the contents of United States Exhibit A-2, for identification purposes. You have already testified that you put the contents in and sealed the envelope. Tell us whether the contents are in the same condition today as they were in when you returned them to Mr. Wells.

A. Yes, they are.

Q. And what are those contents? [85]

A. There is one, two, three, four full capsules and two empty capsules.

Q. And why are the two capsules empty?

A. They are the two I used for a quantitative examination. Probably one of these others ought

(Testimony of Gilbert J. Carr.)

to be broken a little bit. No, I took a part of those two. I also used part of those two for the qualitative tests, and what was left I used as quantitative.

Q. What do you mean by "qualitative" and "quantitative"?

A. Qualitative, to see if cocaine is present; quantitative to see how much cocaine.

Q. And what was the result of your quantitative test?

A. It showed 98½ per cent cocaine hydrochloride.

Q. Will you put those substances back in Exhibit A-2, for identification.

A. (Replaces contents.)

Q. Will you examine the contents of Exhibit A-1, for identification purposes.

A. Yes.

Q. Are those contents in the same condition as they were when you put them in the envelope?

A. Yes, they are.

Q. You said the two capsules were adhered to the top of the Vicks inhaler tube?

A. Yes.

Q. So it was all one unit?

A. That's right.

Q. How come it is in two parts now?

A. First I tried to scrape the contents out of the two little tubes here, if I remember correctly; then I was going to weigh just the contents, but I couldn't get the contents out of these two little tubes here, so I weighed the entire thing by itself. I put the two back together and weighed the whole thing as a whole.

Q. Was it necessary for you to break out—

(Testimony of Gilbert J. Carr.)

A. Well, my original intention was to attempt to weigh the amount of powder which was in here.

Q. Weigh the amount of what?

A. The powder. But it was so small after I had taken these out that I decided to weigh the entire thing.

Q. You were the one who took the two capsules out? A. That is right.

Q. You put the two parts back in the envelope?

A. That's right. I took a little bit of this out and examined it with chloroplatinic acid.

Q. That also proved to be——

A. Cocaine hydrochloride.

Q. What quantity?

A. There was not enough here for a quantitative test. I only made a qualitative test here. [87]

Mr. Hoddick: Your Honor, at this time I should like to offer in evidence the United States Exhibit A-1, for identification purposes, with contents; A-2, for identification purposes, with contents; and this report of the analysis which Mr. Carr now holds in his hand.

Mr. Miho: Objection, if your Honor please. There is a serious flaw in the testimony of this defendant as to the chain of events and the method of testing, and it is not an exclusive process with relation to all of the capsules in Exhibit A-1, for identification. The foundation is improper for its admission in evidence at this time.

Mr. Hoddick: Would you point out what the flaw is, Mr. Miho?

(Testimony of Gilbert J. Carr.)

Mr. Miho: I am not supposed to do your job.

Mr. Hoddick: You should lay grounds.

The Court: The objection is meaningless unless you give it some substance.

Mr. Miho: If your Honor please, if I may state, Mr. Carr has stated that he made one test out of two capsules adhesive to the top—well, to come back to A-1, he has stated he made tests out of one capsule for one purpose, quantitative analysis, and one capsule for another purpose. If your Honor please, there are six capsules altogether, and unless this witness can state he has made a test of the contents of each separate capsule and what it contains, it is improper for that [88] evidence to go in at this time.

Mr. Hoddick: Your Honor, first of all, the witness stated he took two capsules at random. He did not make a qualitative test, as I recall, and correct me if I am wrong, Mr. Carr—he did not make a qualitative test from one and a quantitative test from another. As I gather, he made the qualitative test and then used the remainder for the quantitative; is that right?

The Witness: Yes.

The Court: The upshot is that all you know about the capsules, six in number, is limited to two.

The Witness: I took two at random, that is true, but those two, from a scientific standpoint, could have been any two.

The Court: But you don't actually know what is in the others?

(Testimony of Gilbert J. Carr.)

The Witness: Don't actually know what is in the other four, that is right.

Mr. Hoddick: Your Honor, as I understand the practice in the operation of the Food and Drug Administration and Alcohol Tax Unit work, narcotics work, they only test samples. You want to have a portion of the contents in their original condition. I will admit that the jury in its discretion can determine whether the other four capsules are the same. It goes to the weight of the evidence and not its [89] admissibility.

We have tracked this evidence from the defendant's possession, and we have shown that certain samples taken at random are cocaine hydrochloride, a derivative of cocoa leaves. It is only by inference, because they were samples taken at random, that the jury could find whether all six of the capsules contained cocaine hydrochloride. But I think that is up to the jury to determine and does not go to the admissibility of the evidence.

Mr. Miho: If your Honor please, the jury is not a chemist. They are not required under oath and jury duty to know and guess from one thing to another on an important piece of evidence. If the two capsules Mr. Carr testified about were part of the same mass, Mr. Hoddick's point would be good, but inasmuch as they are in absolutely separate capsules and pieces, his position is entirely untenable, your Honor.

Mr. Hoddick: It is the same thing, your Honor, that is done with one whisky bottle out of a case.

(Testimony of Gilbert J. Carr.)

It has been the standard process. As I said, I won't argue that it has been proved conclusively to the jury that the four capsules there that still have contents in them contain cocaine hydrochloride. I think there is circumstantial evidence from the fact that Mr. Carr merely took a sample, and you have six uniform capsules here, that they do contain cocaine hydrochloride. But I still contend, your Honor, that it is admissible [90] in evidence for whatever it may be worth.

The Court: To prove what?

Mr. Hoddick: To prove that the defendant had in his possession six capsules, two of which, by chemical analysis, taken at random, were cocaine hydrochloride.

The Court: That is the most that it would show.

Mr. Hoddick: And by inference that is up to the jury.

Mr. Miho: If your Honor please, we have no criminal trial in the Constitutional history of the United States trying a man on inference, if your Honor please. This is not circumstantial evidence, such as you see a gun in the defendant's hand and fingerprints on it. This is chemical analysis by an expert witness as to the contents of six separate capsules.

The Court: He hasn't testified as to six, only as to two.

Mr. Miho: Yes, but Mr. Hoddick wants to introduce the four that this chemist doesn't know

(Testimony of Gilbert J. Carr.)

what they contain, under the evidence so far, and to introduce that, if your Honor please, as evidence before the jury is entirely erroneous and highly prejudicial to the defendant's cause. If Mr. Carr knows what is in those capsules and can swear to the contents, that would be something else; but for him to test only two out of six and Mr. Hoddick try to introduce four not tested, certainly that is improper. [91]

Mr. Hoddick: For the purposes of introduction I will stipulate that Mr. Carr, by virtue of a chemical analysis, does not know, as a matter of his own knowledge, that those four capsules contain cocaine hydrochloride, but I think they are admissible to show that the defendant had in his possession six capsules, two of which, by test taken at random, prove to be cocaine hydrochloride. That is all I want.

The Court: On that basis and that basis alone, namely, that only two of the six are positively identified as containing cocaine, the objection is overruled.

Mr. Miho: May I save an exception?

The Court: You may have an exception.

Mr. Hoddick: And, your Honor, I also would like to have introduced as evidence at this time——

The Court: Wait a minute until we get this marked. This is a package containing——

Mr. Hoddick: Six capsules. It is Exhibit A-2, for identification purposes.

The Court: A-2, for identification purposes, becomes——

(Testimony of Gilbert J. Carr.)

The Clerk: U. S. Exhibit No. 2-A.

Mr. Miho: If your Honor please, I would like an elaboration of what the exact limited purpose of the introduction is. It is clear that in Exhibit A-2 there are four capsules that evidently have some white substance in them and no one [92] knows what they are.

The Court: Precisely.

Mr. Miho: But it is going to be introduced in evidence and is permitted to be introduced for the purpose of what, if your Honor please?

The Court: The testimony is, as you know, so far that these six capsules were picked up by Officer Shaffer after the struggle on the defendant's premises, the struggle being with the defendant.

Mr. Miho: Yes.

The Court: This witness testifies that after these things came through channels to him for testing purposes, he tested two of them at random.

Mr. Miho: Yes.

The Court: And the two that he did test, he has testified as to their content. As to what is in the other four has not been the subject matter of chemical analysis. Whether or not, as to the other four, the Government has or has not proved their content beyond a reasonable doubt is a question you gentlemen can argue.

Mr. Miho: May I still save an exception, if your Honor please.

The Court: Certainly.

(Testimony of Gilbert J. Carr.)

(Thereupon the item above referred to was received in evidence as U. S. Exhibit No. 2-A.)

Mr. Hoddick: Will you hand me Exhibit A-1, for identification purposes.

(Handed to Counsel.)

Mr. Hoddick: I would like to offer A-1, for identification purposes, in evidence. This contains the top of the inhaler tube and that other particle which Officer Abbey found and delivered to Mr. Wells and Mr. Wells delivered to Mr. Carr and Mr. Carr analyzed and found it to contain cocaine hydrochloride, but was unable to make a quantitative test to determine exactly what percentage of cocaine hydrochloride.

The Court: The same may become—Hearing no objection; do you have an objection?

Mr. Miho: I would like to enter an objection on the same ground.

The Court: On the same ground?

Mr. Miho: No, if your Honor please. For Exhibit A-1 on the grounds, if your Honor please, that there has not been shown an exclusive continuity of possession, if your Honor please. I would like to incorporate an objection on the other exhibit, the six capsules, A-2.

The Court: Overruled.

Mr. Miho: Save an exception, your Honor.

The Court: Granted.

The Clerk: U. S. Exhibit 2-B. [94]

(Thereupon the item above referred to was received in evidence as U.S. Exhibit No. 2-B.)

(Testimony of Gilbert J. Carr.)

Mr. Hoddick: I would like at this time to show the exhibits to the jury.

The Court: You may.

(Handed to jury.)

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Mr. Carr, with regard to these envelopes that Mr. Wells gave you, when did you receive them?

A. On July 22.

Mr. Miho: If your Honor please, do I understand Mr. Hoddick wishes to introduce what he is reading from in evidence?

Mr. Hoddick: Excuse me. I did make an offer and it slipped my mind for the moment.

Mr. Miho: May I be permitted to examine the manuscript?

The Witness: This is the record in the laboratory. Do I get that back?

Mr. Hoddick: If it is introduced, you will get a photostat of the original or the original back. [95]

The Court: You did mention offering that, but you let it fall by the wayside.

Mr. Hoddick: I would like to reopen my direct examination for the purpose of offering this in evidence.

I offer Customs Laboratory Record Card, Lab 200-201, containing the date July 22, 1949, up in the upper right-hand corner, in evidence.

(Testimony of Gilbert J. Carr.)

The Court: Mr. Witness, this is your record?

The Witness: That is right.

The Court: And the substance that you have testified?

The Witness: Yes.

The Court: The same may become——

The Clerk: U. S. Exhibit 2-C.

(Thereupon the document above referred to was received in evidence as U. S. Exhibit No. 2-C.)

Mr. Hoddick: May I have permission, your Honor, to withdraw that and substitute a photo-static copy at the conclusion of this trial?

The Court: Yes. Now you may cross-examine.

Q. (By Mr. Miho): You received these two articles that the jury is inspecting now from Mr. Wells? A. That's right.

Q. In your office? [96] A. That's right.

Q. And when was that? A. On July 22.

Q. And in what condition did you receive them?

A. I don't remember. I am testifying solely from the record there or if my initials are on the envelope. He just gave me a package.

Q. I am just trying to recollect your memory.

A. He usually brings a package over, just a sealed envelope. Or, as a matter of fact, on every case he has brought a sample over in a sealed envelope.

Q. As a matter of fact, you are the only Federal chemist; is that right? A. That's right.

(Testimony of Gilbert J. Carr.)

Q. And you have a lot of work, don't you, Mr. Carr, that is, for other people; it is rough on you; and about July 19, it is—22nd——

A. July 22.

Q. When you got these envelopes from Mr. Wells. How many tests for narcotics were you making at that time, how many other tests?

A. Probably none at that particular time. Mr. Wells is about the only one who brings me samples of narcotics. I get some samples of narcotics from examiners sometime, but at that particular time the longshoremen strike was on. [97]

Q. You are not sure, are you? You think these were the only ones, so far as your recollection goes?

A. That's right. I don't remember July 22.

Q. And at what time?

A. I think that is on the envelope.

Q. You are not sure. A. I am not sure.

Q. Anyway you received them. And what is your usual practice? What did you do?

A. In his presence I opened the package, and then make those few preliminary tests right in his presence to see whether they do contain narcotics. If they don't, he can take them back and go about his business. In this particular case, if they do, then I keep them.

Q. Did you do that on this occasion, do you recall? A. I did. Yes, I did.

Q. Then Mr. Wells just didn't give you the envelopes and let you do the tests and walk out?

A. No, he usually stays for a few minutes to

(Testimony of Gilbert J. Carr.)

see the outcome of the preliminary test.

Q. He didn't just hand you these envelopes and walk out of the room? A. No.

Q. He stayed around?

A. He stayed around and was in my presence when I opened [98] the envelope.

Q. Then he left you?

A. Probably sometime afterwards.

Q. Then you continued your tests?

A. That's right.

Q. The same day or the next day?

A. It went over a period from 22nd to 25th.

Q. For about three days? A. Yes.

Q. Your office is not like a safe where no one else can get in; isn't that right?

A. I have the only key—at that particular time I had the only key to the one door on the second floor.

Q. But during the day when you are working, you go back and forth from that office; you don't close the door and lock it each time you go out of the room? A. That's right.

Q. So if someone had come into your office when you were testing from the 22nd to the 25th, you wouldn't know who could have come in, would you?

A. I would have some idea. I am in there most of the time.

Q. Anyone could walk in; the door is open?

A. That is right, the door is open.

Q. If you went to see someone down the hall and someone [99] had walked into that office, you wouldn't know?

(Testimony of Gilbert J. Carr.)

A. If there was somebody unusual, I would find out somehow.

Q. But you have no watchman there when you walk out of that office? A. No. That is right.

Q. Do you recall how many people walked into your office during that interval of time while you were making these tests?

A. I don't remember any.

Q. You don't remember anyone coming in to see you?

A. I don't remember this particular day.

Q. How about the 23rd? A. No.

Q. Or the 24th? A. No.

Q. You kept on making these tests from about the 22nd to the 24th, 25th?

A. Twenty-second to twenty-fifth.

Q. Where did you leave these capsules and these other things, Exhibit A-2, during those three or four days?

A. They were in one of my drawers in the laboratory. I have a certain part of the lab there in which I have all my narcotic reagents. There must be about forty drawers in my laboratory, and when I am working on narcotics I put them [100] in not the same drawer every time.

Q. You put them in different drawers?

A. Different drawers.

Q. And then work on them?

A. That's right.

Q. Where did you place the envelopes?

A. Same drawer. In case somebody does call in,

(Testimony of Gilbert J. Carr.)

they might get curious, so these are placed in these drawers.

Q. They have no locks on them, though?

A. Not the same one every time.

Q. I said, the drawers have no locks on them, though?

A. No, we haven't. That is why I have the various drawers.

Q. Now, Mr. Carr, these two capsules adhesive to the inhaler top, you could not make a quantitative test?

A. No, there was not enough.

Q. Not enough? A. That's right.

Q. So that you don't know what percentage of cocaine was in those?

A. No, I don't.

Q. But you think that there was cocaine?

A. I know there was cocaine.

Q. You were able to make a test? [101]

A. Yes.

Q. That there was cocaine in them?

A. That's right.

Q. Then after you finished your test, you made your notes. You made your Mayer and Wagner tests, and what other tests did you make?

A. You test to see whether it is a chloride or nitrate.

Q. Acid?

A. What particular type of acid it is. I used silver nitrate, which is a test for a chloride.

Q. And you made all those tests?

A. That's right. No, no, I usually—Most of your narcotics are chlorides, so I used silver nitrate

(Testimony of Gilbert J. Carr.)

first, which immediately eliminates all the other ones.

Q. And you finally came to the conclusion that so far as two capsules out of six were concerned, they were cocaine? A. That's right.

Q. Cocaine hydrochloride? A. Yes.

Q. And the percentage of it?

A. No, not the——

Q. You don't know how much it contained?

A. No, I don't, not these two——

Q. The two capsules out of the six that you tested, you don't know the quantity it contained?

A. The two I tested, yes, I do. [102]

Q. What was that percentage?

A. It was around 98—it is on the back; 98½ per cent cocaine hydrochloride.

Q. I see. Now these Wagner and Mayer tests and other acid tests you performed, they are not exclusive to cocaine derivatives, are they?

A. The chloroplatinic acid is.

Q. At what stage did you use that?

A. That was at about the third or fourth stage. using Mayers first and Wagners and various other reagents for morphine alkaloids, and then the chloroplatinic acid.

Q. Then you tested it for the presence of cocaine? A. That is right.

Q. And you say that is conclusive for cocaine?

A. Specific for cocaine. Specific. No other substance, as far as I know right now, gives exactly the same type of crystals. I have never seen any in

(Testimony of Gilbert J. Carr.)

my 22 years in laboratory. I haven't seen anything in any literature.

Q. What about synthetic cocaine?

A. Synthetic cocaine does not give it either.

Q. Are you sure about that?

A. Absolutely sure.

Q. Any coal tar derivatives that might give the same kind of crystals? A. No. [103]

Q. On the same kind of test? A. No.

Q. You are sure of that? A. I am sure.

Q. What is cocaine derived from, Mr. Carr?

A. The leaves of the cocoa plant.

Q. How is it processed?

A. I am not familiar with the processing.

Q. Well, cocaine hydrochloride, such as in these two capsules that you found, they are in a powder form; is that right? A. That's right.

Q. And you have to liquefy it in order to find the crystals in it?

A. I don't get what you mean.

Q. That final test you spoke of, you put it in sort of a liquid form?

A. No, just take a little bit of the powder and add chloroplatinic acid to it and it forms these particular crystals.

Q. You are not sure what is in the other four capsules; is that right? A. No, I am not.

Q. Merely by looking at it, unless you make and complete these six or seven tests, you cannot tell what they are; is [104] that right?

A. That's right.

(Testimony of Gilbert J. Carr.)

Q. If you wanted to, you could have tested all four capsules?

A. That is right. When I took those two, if one had not been cocaine, I would have examined the rest of them. By taking them at random, and those two were cocaine, I can safely assume the others were cocaine.

Q. Safely assume?

A. I can safely assume from past testing.

Q. Will you say positive? A. No, sir.

Q. You can't say except that you assume?

A. No, sir.

Mr. Miho: That is all.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Hoddick: May I have just half a moment of the Court's time.

The Court: Yes.

Mr. Hoddick: Call Captain Whitford, please.

HUGH WHITFORD

called as a witness on behalf of the Plaintiff, being first [105] duly sworn, was examined and testified as follows:

The Court: Will you state your name, age, residence, occupation, and citizenship.

The Witness: My name is Hugh Whitford. I am 45 years old.

The Court: Residence?

(Testimony of Hugh Whitford.)

The Witness: Live at 1437 Pele Street.

The Court: Honolulu?

The Witness: Yes.

The Court: Occupation?

The Witness: I am lieutenant detective with the Honolulu Police Department, and I am a citizen of the United States.

The Court: Only?

The Witness: Yes.

Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Captain Whitford?

A. About 19 years and four months.

Q. And in July of 1949 what were your duties?

A. I was captain of the police in charge of vice division for the Honolulu Police Department.

Q. Do you know the defendant, Orestus Cavness? A. I do. [106]

Q. Will you point him out, please?

A. The man sitting down at the end there (indicating).

Q. The far end of the table?

A. That is right.

Mr. Hoddick: May the record show he has identified the defendant.

The Court: Yes.

Q. (By Mr. Hoddick): Did you see the defendant during July of 1949? A. I did.

Q. Do you remember what day it was?

A. July 19.

(Testimony of Hugh Whitford.)

Q. And did you make a raid on the defendant's house on that day? A. I did.

Q. At what address?

A. 3811 Leahi Avenue.

Q. And where had you been immediately prior to the raid? A. Where was I you say?

Q. Yes.

A. I was across the street in the home of Mr. Abbey.

Q. And was he—— A. That same date.

Q. Is he connected with the police department?

A. Yes. [107]

Q. In what way?

A. We went for the purpose of——

Q. What is Mr. Abbey's connection with the police department?

A. He is a reserve with the police, police reserve.

Q. What time did you get to Officer Abbey's house?

A. I believe it was about 2:35 p.m., 2:40, somewhere around there.

Q. Were there other officers with you?

A. Yes.

Q. Who?

A. Sergeant Sasaki, Richard Sasaki, and Sergeant Sousa, and Officer Paul Shaffer, and Agent Wells, and Mr. Abbey.

Q. And yourself? A. And myself.

Q. And about what time did you actually consummate the raid?

(Testimony of Hugh Whitford.)

A. It was about 5:30, 5:38, somewhere around there, p.m., the same day.

Q. And did all the officers leave Officer Abbey's house? A. That's right.

Q. Now will you just describe, telling only the things you know, that you saw, what took place right after you left Officer Abbey's house. [108]

A. We left Officer Abbey's home when we noticed the defendant Cavness here driving his car into the driveway of his home. Agent Wells and I left together, and we crossed the street and walked over to where the defendant's car was parked in the driveway of his home, and as we approached the car, we separated. We were in the rear of the car. The car was facing toward the house. We were in the rear of the car; we separated; I went to the right side of the car; Agent Wells went to the left side, or the driver's side, in other words.

Q. Was there anybody in the car with the defendant? A. What was that?

Q. Was there anybody in the car with the defendant?

A. No. No, the defendant was alone.

Q. And what kind of a car was it?

A. It was a Hudson car.

Q. A sedan?

A. A sedan, yes. And as I got to the right-hand side of the car in the front where the front door is, all of a sudden I figured there was something wrong.

Q. What made you think there was something wrong?

(Testimony of Hugh Whitford.)

A. Well, I heard sort of commotion like. The defendant was out of the car, and I ran around to the front of the car to see what was happening, and as I got to the front of the car and a little to the left of it, I saw Agent Wells and [109] Sergeant Sousa hanging onto the defendant here, one on each side, and gave me the impression that the defendant was trying to get away, or something to that effect; so I joined in and tried to hang onto the defendant, and by that time he sort of staggered like they were trying to hang onto him. I joined in and tried to get hold of the defendant here to hold onto him, and we all fell down to the ground, and he fell forward and was completely on his stomach and his face downward, and I got onto his right, the defendant's right, as he laid there, and looked at him. I noticed he was chewing on something. I didn't know what it was at the time, but all I could see was a little particles of what appeared to be green and white in color.

Q. Where did you see these particles?

A. On his lip, on his lower lip.

Q. Did it make any noise when he chewed on it?

A. Yes, there was a crackling sound. And I figured, well, he was trying to probably get rid of something, so I tried to see if I couldn't get the thing, whatever he had in his mouth, out. Tried to get my fingers in and I almost got bitten, so I pulled my fingers back, and at that time I noticed also he had his right fingers clenched tightly, so I was trying to get it open and see what was in it. I figures

(Testimony of Hugh Whitford.)

he had something in there, and he at the same time was trying to pull his hand away from me. He was trying to pull it back and [110] underneath of his face. That kept on for a little while and by that time I noticed Reserve Officer Abbey there, so I asked him if he minded to assist me, and he got hold of his blackjack and he tapped his hand a few times and opened it; so I got hold of what he had in his hand.

The Court: All right, we will stop there for our noon recess and resume at 2 o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2 p.m. of the same day.) [111]

Afternoon Session

The Court: The jury is present and so is the defendant. Are the parties ready to proceed?

Mr. Miho: Yes, if your Honor please, ready for the defendant.

Mr. Hoddick: Ready for the plaintiff, your Honor.

HUGH WHITFORD

resumed the stand and testified further as follows:

The Court: Captain Whitford, I remind you you are still under oath. I believe you were about—I forget where I interrupted.

Mr. Hoddick: I believe Captain Whitford was just testifying that Officer Abbey tapped the defendant's hand.

The Court: Oh, yes. All right, you may proceed.

(Testimony of Hugh Whitford.)

Direct Examination

(Continued)

By Mr. Hoddick:

Q. Captain Whitford, did the defendant open his hand after Officer Abbey hit it with the blackjack? A. Yes, he did.

Q. And which hand was that?

A. The right hand.

Q. And did you take something from that hand?

A. I did.

Q. What did you take?

A. A broken piece from a Vicks inhaler tube.

Q. Which part of the tube was it?

A. I believe it was the top part.

Q. What do you mean by the top part of the tube?

A. Can I explain it with that Vicks inhaler tube there? I believe it was this portion here, this upper part (indicating).

Q. You think so. What did you do with the piece?

A. Took it back to the station, and I turned it over to Agent Wells after I marked it.

Q. Is it possible it was another part of the tube?

A. Could be possible.

Q. And where in the station did you give it to Mr. Wells?

A. In my office in the vice division.

Q. Now, after getting this piece of inhaler from the hand of the defendant, what took place?

A. Well, shortly after that, the defendant was

(Testimony of Hugh Whitford.)

subdued and we all got up and then we went to the house, I believe to the house right after that.

Q. And what happened in the house?

A. Well, in the house the men that went in with us were instructed to keep with Agent Wells there and to search the house after we were ready, after he had served the warrant on the defendant.

Q. Did you have occasion to go out of the house after going into it? [113] A. Yes.

Q. Why?

A. Someone mentioned the fact that there was something out on the grounds that looked like it might interest Mr. Wells here.

Q. That looked like what?

A. White capsules of some kind that might interest Mr. Wells.

Q. Did you go out, too? A. I did.

Q. And did you go back into the house again?

A. Yes.

Q. About how long were you in the house?

A. About fifteen to twenty minutes.

Q. Pardon?

A. About fifteen or twenty minutes.

Q. Then what did you do?

A. I went in the back yard, walked around the back yard there and came back in the house. I was in and out most of the time.

Q. About what time did you go down to the station?

A. I believe it was about 8 o'clock, I think, or just before 8.

(Testimony of Hugh Whitford.)

Q. It was after you got there that you gave this part of the inhaler tube to Mr. Wells? [114]

A. Yes, I believe that is when it was, when we got down there.

Q. Did you see what Mr. Wells did with it after you gave it to him?

A. Do I know what he did with it, you say?

Q. Yes, did you see what he did with it?

A. He put it in an envelope.

Q. Did he seal that envelope in your presence?

A. I don't recall.

Q. From the time that you removed this part of inhaler tube until the time that you gave it to Mr. Wells was there any change in its condition?

A. You mean the condition of the tube?

Q. Of the part that you found.

A. No, I don't—I don't think so.

Q. Was it in your possession during that entire period? A. I believe so.

Q. What did you do with it after you took it from the defendant's hand? Did you put it in your pocket?

A. I don't remember that part. I had it in my hand. I may have turned it over to somebody then at that time and got it back later.

Q. Let me ask this, Captain Whitford: When you gave that part to Mr. Wells, was it then in the same condition as when you found it? [115]

A. Yes, as near as I can recall, yes.

Q. When you found it, did you show it to Mr. Wells? A. I did.

(Testimony of Hugh Whitford.)

Q. Was that before or after Cavness was subdued? A. I believe it was after.

Q. And did Mr. Wells keep it or did he give it right back to you, at that time when you first showed it to him? A. I believe——

Mr. Miho: If your Honor please,——

The Court: Wait.

A. (Continuing): I don't remember that.

Mr. Miho: That is a very leading question.

The Court: Sustained.

Q. (By Mr. Hoddick): What did Mr. Wells do with it after you first showed it to him, Captain Whitford? A. I believe he kept it.

Q. Do you know for how long?

A. No, I don't remember. Well, for a short while, for a short while. He kept it for a short while and then he gave it back to me, I believe.

Q. Did he give it back to you before or after you left the defendant's house?

A. I believe it was before we left the defendant's house.

Q. And you kept it until you got to the police station? [116] A. Yes.

Q. Do you remember whether you placed any identifying marks on that piece of inhaler tube?

A. I did.

Q. And what did you put on it?

A. I had my initials on there with the date and the time.

Q. Will you open up Exhibit B for identification purposes. Or, before you open it, Captain Whit-

(Testimony of Hugh Whitford.)

ford, when did you put your initials on it?

A. Just before I turned it over to Mr. Wells in my office.

Q. At your office. Just tear open one end. Now, do you recognize the contents of that envelope?

A. I do.

Q. Do your initials appear on the contents of that envelope? A. Yes.

Q. Do you recognize those contents?

A. I do.

Q. Where did you see them before, or it before?

A. At the defendant's home.

Q. Is that the piece of tube that you took from the defendant's hand? A. That's right. [117]

Q. Is that the piece you gave to Mr. Wells to see? A. That's right.

Q. Is that the piece he gave back to you?

A. Yes.

Q. And is that the same piece you gave to him later at the police station? A. Correct.

Q. Is it in the same condition now as it was when you gave it to him at the police station?

A. That's right.

Mr. Hoddick: At this time, your Honor, I would like to offer this piece of Vicks inhaler tube in evidence, and to facilitate the marking I suggest we can put it back in the envelope that the Captain just took it out of.

Mr. Miho: I still object to it, if your Honor please. No continuity of possession proved by the Government, your Honor, no proper foundation being laid.

(Testimony of Hugh Whitford.)

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: Granted. The same may become——

Mr. Miho: United States Exhibit No. 3, your Honor.

The Court: Three?

The Clerk: Yes.

(Thereupon, the document above referred to was received in evidence as United States Exhibit No. 3.) [118]

Mr. Hoddick: With the Court's permission I will show it to the jury.

The Court: Let the Clerk mark it first, please.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Was the defendant Cavness with you at the time you showed this piece that you placed in the envelope that you just opened up to Mr. Wells?

A. You say, was the defendant with me?

Q. Yes. A. I don't believe so.

Q. You showed this piece to Mr. Wells in the house, you say? A. No, outside.

Q. Outside? A. In the yard.

Q. And that was after the struggle was over?

A. That's right. That's right.

The Court: Speak louder, please.

The Witness: Yes.

Q. (By Mr. Miho): And who else was present

(Testimony of Hugh Whitford.)

when you showed this piece to Mr. Wells, if anyone was present?

A. I don't remember who it was. There was somebody there, [119] but I just don't remember who it was.

Q. You don't remember who? A. No.

Q. You don't remember where you put the piece from the time you showed it to Mr. Wells up to the time you gave it to him in the vice squad, in your room; you don't remember where you placed it, whether you kept it in your mouth, stuck it in your ear, in your pocket, coat pocket, or your shirt pocket, you don't remember?

A. After I gave it to him and he gave it back to me, you mean?

Q. Yes, if he gave it back to you.

A. I don't remember.

Mr. Hoddick: Captain Whitford, will you speak loud enough so that all of the jurymen can hear you.

The Witness: I don't remember.

Q. (By Mr. Miho): Captain Whitford, you were there at Officer Abbey's house for about two hours waiting for Mr. Wells to make his move on this alleged raid; is that right? You and your men were waiting about two hours, from about two o'clock, two-thirty, until about six o'clock, a little before six, five-thirty or six; is that right?

A. That's right.

Q. And during that time you and your officers, except Mr. Abbey, were in the front sitting or living

(Testimony of Hugh Whitford.)

room; is that [120] right, facing the defendant's house? A. Yes, we were in the living room.

Q. Do you remember whether Mr. Abbey went from where you people were into the kitchen and back or not to get something?

A. No. He could have. I don't remember that.

Q. Do you remember his giving you a glass of water with ice in it? Do you remember that?

A. I believe he did, yes.

Q. Do you remember his giving a glass of water with some ice in it, a glass of water to Mr. Wells?

A. I don't remember that.

Q. You don't remember that. How about your other officers?

A. They may have. We were scattered around in the living room there. They may have.

Q. Do you remember eating anything, something to chew on?

The Court: I don't understand that.

Mr. Miho: I asked him whether he remembers eating anything during that waiting period.

A. I don't remember eating anything.

Q. Do you remember whether Mr. Abbey served you with anything to chew on while you were waiting there in his house? A. No.

Q. You don't remember? [121]

A. I don't remember.

Q. He may have served you something?

A. He could have.

Q. Do you remember anything other than glasses of water with ice in them served to you people?

(Testimony of Hugh Whitford.)

A. No.

Q. You don't. There was not any whisky served to the men?

A. I didn't see any if there was any there.

Q. And then you waited and then you stepped out of the house about the time Cavness drove into his yard; is that right?

A. That's right.

Q. And you and Mr. Wells came out of the house first?

A. That's right.

Q. And when you came out of the house Cavness had just driven into his front yard, into his driveway?

A. Correct.

Q. And you separated just as you got to the defendant's premises and you went to the right of the defendant's Hudson car and Mr. Wells went to the left of the defendant's car?

A. That's right.

Q. Now just a moment before you separated from each other, Wells and yourself, did Mr. Wells have his hands, or hand, in his pocket, or how did he have his hand, just out [122] like this (indicating) and walking?

A. I don't remember. I was too occupied with myself. I don't know where he had his hand.

Q. So that you don't know what he had in his hand when he went around the car and got separated?

A. No.

Q. You don't know whether Mr. Wells had anything in his hand or not?

A. No, I don't remember.

Q. You went to the front of the Hudson then?

(Testimony of Hugh Whitford.)

A. To the right front, yes.

Q. To the right front. Your idea was to cut off any escape, if any, from the front portion of the Hudson car; is that correct?

A. Could be that.

Q. Who went with you to the right front?

A. I believe I was alone.

Q. You were alone. Did you observe or did you give any instructions as to where the rest of the officers were to proceed or how they were to proceed, or whom they were to follow?

A. They were to follow both Mr. Wells and I.

Q. You don't know which officer actually followed you or Mr. Wells after you separated?

A. No, I don't. [123]

Q. You got to the front of the car anyway; is that right?

A. The right front, yes.

Q. And then as you got to the right front, you say you felt or saw or heard a commotion of some kind?

A. That's right.

Q. You were not in any position to see what was going on towards the left front where Mr. Wells was then?

A. No, from where I was at that time I was not able to see.

Q. And something drew your attention to the left; is that right?

A. That's right.

Q. And then you rushed over to the front left of the Hudson car?

A. That's right.

Q. And then you say you saw Mr. Wells and Sousa struggling with the defendant?

(Testimony of Hugh Whitford.)

A. They were hanging onto him. They were trying to hold him. He appeared as though he was trying to get away from them.

Q. And Wells was hanging onto what part of his body? A. I believe he was on the left.

Q. Hanging onto his left arm? A. Yes.

Q. Mr. Wells' two hands hanging onto the defendant's [124] left arm?

A. I am not sure he had both arms, but I am sure he was hanging onto him.

Q. Could have been both arms?

A. I am referring to Mr. Wells. He could have used both hands in holding the defendant.

Q. But you are not so sure? A. No.

Q. Anyway, you rushed over?

A. That's right.

Q. Which way was the defendant facing with relation to you as you came over to the left front?

A. He was facing towards the makai. By that I mean he was facing towards Waikiki direction.

Q. If this is the Hudson car (indicating), was the defendant facing this direction, as I stand, if this was the car, this being the front of the car, this the front door here (indicating), was the defendant facing in this direction (indicating)?

A. Yes, he was facing—but he wasn't standing that way. He was down more.

Q. Kneeling down?

A. And the upper portion of his body was slightly forward.

Q. Slightly forward? [125]

(Testimony of Hugh Whitford.)

A. Yes, something like that.

Q. Did he have his arms out like that (indicating) at that time?

A. No, not out that far, had it more along his side.

Q. And Wells was hanging onto his left arm at that time? A. That is right.

Q. And Sousa was hanging onto his right arm?

A. Yes, I believe Sousa was hanging onto his right side.

Q. And did you see Abbey hanging onto his legs?

A. I don't remember that.

Q. Did you see Cavness fall down at that time as he was front like this (indicating), in this position (indicating), Sousa on this side (indicating), Wells on this side (indicating), did you see Cavness go down on his knees?

A. No, I don't remember him going all the way down.

Q. Were you able to get to Cavness at that point?

A. Yes, I got to him—When I got to him he was just getting up, so I started to hang onto him.

Q. What part of his body did you grab?

A. I was trying to get over to the right side, and by that time there was somebody else other than Mr. Wells and Sousa.

Q. Sasaki there, do you remember? [126]

A. I don't remember seeing Sasaki there. He may have been in the back. I didn't see him from the position I was at that time.

(Testimony of Hugh Whitford.)

Q. You didn't see Abbey there at that time just as you got to the defendant?

A. I couldn't distinguish who it was. I remember distinctly Mr. Wells and Sousa. There was somebody else there, but who it was I don't know, until after that, until we were on the ground. That was right after this when we kept hanging onto him until everybody fell down to the ground.

Q. But you hung onto the defendant's right arm?
A. That's right.

Q. Is that right?

A. I tried to, but others were trying to come in, too, at the same time.

Q. When you got to the defendant, you saw the defendant with his arms back like this (indicating)?

A. More or less.

Q. And you were able to grab his right arm; is that right?
A. That's right.

Q. And you hung onto it; is that right?

A. I tried to hang onto it, but all the time he was moving and struggling at the same time.

Q. What did he do? [127]

A. He was trying to get away.

Q. What happened to his arm? Was he able to get away from you and Sousa, his right arm? Was he able to get his right arm away from you and Sousa?

A. I don't remember whether we were able to hang onto him constantly at that time. He was pushing, trying to pull away from us, and we were trying to hang onto him.

(Testimony of Hugh Whitford.)

Q. So you don't know whether he got his arm away from you and Sousa?

A. I was trying to concentrate on his right arm and hang on, and all the time we were moving; we weren't in one place.

Q. Do you know whether at that time Cavness was bleeding from the back of his head?

A. I don't recall.

Q. Was he bleeding from the front of his face at that point?

A. At that time I don't know; I couldn't see him. He had his head down most of the time.

Q. Then you couldn't see whether he was chewing anything or not, could you?

A. Not at that time.

Q. When did you see him chew anything?

A. When he was flat on the ground.

Q. When he was flat on the ground you saw him chewing [128] something? A. That's right.

Q. How did he have his hands when he was flat on the ground?

A. When he first fell flat to the ground, he had both hands this way; he was chewing on something; had both arms this way (indicating). I grabbed hold of his right hand and yanked it, and by that time somebody on his left got hold of his left hand, and he kept moving too fast all the time, and that is when I noticed he was bleeding on the lip.

Q. When he was flat on his stomach, he was able to put his hands like that?

A. Yes, he had his head up.

(Testimony of Hugh Whitford.)

Q. Was anybody on his back holding him down?

A. Oh, yes, there was somebody there.

Q. Holding him down?

A. Holding him down, or holding him up; I don't know just what, but there was somebody there.

Q. The defendant had both arms like this (indicating), his wrists in front of him, and he was chewing on something?

A. He was chewing on something.

Q. And he was making crackling sounds?

A. That's right.

Q. What did you do?

A. I yanked his right hand away from him.

Q. You yanked his right hand away from him.

A. And that is when I noticed he had his fist clenched like this (indicating) and I was trying to open it, and all the time he kept pulling it.

Q. What about his left arm?

A. His left hand was on the other side. Somebody got hold of it.

Q. You don't know?

A. I don't know what happened to his left hand. I was concentrating on his right hand.

Q. When you got his arm away from his mouth, you had hold of his right arm; is that right?

A. Yes, I had hold of it for a little while until he pulled it back again. He kept pulling his arm back, and I kept pulling his arm toward my direction.

Q. And he kept chewing?

A. Yes, he kept chewing.

(Testimony of Hugh Whitford.)

Q. What did he chew?

A. I don't know. All I saw was particles on his lower lip, adhering to his lower lip, white and green.

Q. White and green just like this (indicating)?

A. Something like that.

Q. And did you pick those pieces out of his mouth?

A. No, not that time. I almost got bit one time, so I didn't try to stick my finger another time.

Q. What happened to the pieces? Did you ever pick them up, you or the officers?

A. I don't know what happened at that time.

Q. But you are sure there were some pieces of white and green on his lips? A. That's right.

Q. Does this look like the top of a Vicks inhaler to you?

The Court: This being Exhibit 3.

Q. (By Mr. Miho): Does that look like the top of a Vicks inhaler to you? A. No.

Q. It is the bottom, isn't it, Captain?

A. I just assume it is the bottom. I don't even know which is the top and bottom of a Vicks inhaler tube.

Q. I show you—— A. It is the bottom.

Q. Well, you were mistaken about it when you said you picked up the top of a Vicks inhaler from the defendant; is that right? You were mistaken; is that right?

A. Well, I don't know which was the top and which was the bottom until now.

Q. You did say that you picked up the top of

(Testimony of Hugh Whitford.)

an inhaler, though, in answer to Mr. Hoddick's question? A. I did. [131]

Q. And you must have had some idea of what was the top and what was the bottom of a Vicks inhaler when you answered Mr. Hoddick; is that right? A. Yes.

Q. You still say you didn't know which was the top and which was the bottom when you answered Mr. Hoddick's question that you picked up the top part of a Vicks inhaler from the defendant's hand?

A. I did say that, yes.

Q. But you actually knew which was top and which was bottom of the Vicks inhaler tube? You knew at the time which was the top and which was the bottom? A. I felt that I knew, yes.

Q. And you answered that what you picked out of the defendant's hand was the top of a Vicks inhaler; isn't that right?

A. That's what I said.

Q. So this is not the piece, this may not be the piece that you picked up? Take a good look again.

A. This is the piece I marked; I know that.

Q. Whose initial is this over here, Captain Whitford, P. S.; is that yours or Paul Shaffer's?

A. That is not mine.

Q. That is not yours?

A. Mine is H. L. W. in here. [132]

Q. You are familiar with Paul Shaffer's handwriting, aren't you, your immediate subordinate officer, aren't you?

(Testimony of Hugh Whitford.)

A. Not too much. I mean, I wouldn't be able to identify his handwriting now if he wrote, I don't think. He was not with me very long.

Q. Paul Shaffer never marked this in front of you when you gave it to Mr. Wells, or at any time in your presence, did he, so far as you know?

A. So far as I know, yes.

Q. So far as you know, the only one who marked this Exhibit 3 was yourself; is that right?

A. So far as I know, yes.

Q. And you had this thing in your possession all the time until you gave it to Mr. Wells in the vice squad captain's office, your office, and he placed it in this envelope and sealed it up?

A. I didn't see him seal it. I had it and turned it over to him in my office.

Q. You don't remember seeing him seal it. Now, are you sure he did seal it? A moment ago, in answer to Mr. Hoddick's question, you said you were not sure whether you saw Mr. Wells seal this in the presence of yourself or not. Now you say you are sure that you don't remember his sealing it in your presence. Now which is the correct answer?

A. I don't remember him sealing that. [133]

Q. Is that certain? You are sure about that?

A. Yes.

Q. So that if anyone else placed this P. S. mark on this exhibit, you don't know who did it? That is not your handwriting; you told us that is not your mark.

A. P. S. is not my mark.

(Testimony of Hugh Whitford.)

Mr. Miho: I would like to renew my motion, if your Honor please, to exclude this exhibit.

The Court: Your motion what? There is no motion.

Mr. Miho: I would like to renew my objection to its introduction, if your Honor please.

The Court: On what ground.

Mr. Miho: On two grounds. First, that the witness' own statement is that he picked up the top of a Vicks inhaler, and when he answered Mr. Hoddick's question, he knew which was the top and which was the bottom of a Vicks inhaler, which is contrary to the exhibit.

Secondly, he says he was the only one who marked it before the exhibit was handed over to Mr. Wells, and he admits on this particular exhibit introduced there is a mark on it, P. S., which he did not make, and he doesn't know who made it.

Mr. Hoddick: Your Honor, I asked him which part of the Vicks inhaler tube it was, and he said he thought it was the top. I asked him if perhaps it was some other part of the Vicks inhaler tube, and he said, "It might have been." [134] He also went on and testified later that that piece of tube which has been marked Government's Exhibit 3 is in the same condition now as it was when he gave it to Mr. Wells, and he identified his own initials on it.

Now, I think the question of how the P. S. got on it doesn't run to the admissibility of the evidence at all. It might establish that somebody else was present at the time he handed it to Mr. Wells and per-

(Testimony of Hugh Whitford.)

haps he put his initials on it. But he says it is in the same condition now as when he gave it to Mr. Wells. Mr. Wells says it is in the same condition as when he received it from Captain Whitford. I think that is enough to make it admissible in evidence and make it sufficient that Mr. Miho's motion to have it excluded should be denied.

The Court: Objection overruled.

Mr. Miho: May we save an exception, your Honor.

The Court: Granted.

Q. (By Mr. Miho): When you opened the defendant's right hand, and you say the defendant was chewing, and bringing his hand toward the front of his mouth or bringing it back, and you were struggling and trying to move his arm from the front of him to the side; is that right, and he had it in his fist closed up tight? A. That's right.

Q. And you had to ask Officer Abbey to tap his hand [135] with a blackjack to open it; right?

A. Right.

Q. And at the time Abbey was on the left-hand side, or right-hand side of the defendant, do you recall, as he lay prone on his stomach when you asked Officer Abbey to tap his wrist with his blackjack, which part of the defendant's body was Abbey standing on, or was he sitting on the defendant's buttocks?

A. I don't know what part of the defendant's body.

Q. Didn't you tell us yesterday, during the

(Testimony of **Hugh Whitford**.)

course of our hearing on our motion that he was on the left-hand side of the defendant, standing on the left-hand side of the defendant?

A. I didn't tell you that yesterday. I was not here yesterday.

Q. Well, the last time that you took the stand here, Friday.

A. Friday I may have said that.

Q. Friday you may have said that?

A. Yes.

Q. Well, today you are not sure?

A. Anyway he was there somewhere because I asked him—the position I was in, Abbey was on my left.

Q. He was on your left?

A. I was on the defendant's right. [136]

Q. You were on the defendant's right

A. That's right.

Q. And you asked Officer Abbey to tap his right hand? A. Yes.

Q. Right? A. That's right.

Q. And what else fell out of his right hand as Officer Abbey tapped it open, if anything? Just this piece here (indicating)? Just this piece here (indicating)?

A. I don't know what fell out. That piece didn't fall out. I took it out of his hand when he opened his hand, his fingers.

Q. Did you examine the defendant's palm at the time?

(Testimony of Hugh Whitford.)

A. No, not the way he was acting, I couldn't examine it.

Q. Did you notice his palm at any time? At any time later on? A. No.

Q. You did? A. No.

Q. Did you get a report from Officer Marcotte as to what the doctor found was wrong with him as far as injuries were concerned, or were you interested in that? In police procedure whenever anyone is injured, the Captain in charge gets the report of the extent of the injuries; that is pretty important, [137] isn't it?

A. That goes to the records bureau.

Q. But you have to report it with your OK before it goes to the records bureau?

A. I have officers under me.

Q. In this case he didn't know what happened to his medical reports.

A. That is part of their duties, to OK those reports.

Q. That is part of their duties, to OK those reports? A. That's right.

Q. Whose duty?

A. Sergeants under myself.

Q. But the sergeants report to you, don't they? The sergeants report to you, don't they?

A. They do not in every case.

Q. Not in every case. You mean the sergeant would send a report directly to the records bureau without your OK?

(Testimony of Hugh Whitford.)

A. Sure, they can do that.

Q. Did they do it in this case? What I am trying to get at is, Captain Whitford, you got no report of the defendant's palm being marked or cut in any way at any time, did you?

A. No report that I saw. I didn't see any report like that, but there may have been a report like that.

Q. There were no marks or cuts on his hand at the vice squad room, were there? [138]

A. I don't remember that.

Q. There were no scratches or cuts on the defendant's palms at the defendant's home?

A. I don't remember.

Q. But there were other marks on the defendant's head, his mouth and right cheek; isn't that right? Those injuries you checked, didn't you, at one time or the other?

A. The one I saw was on his mouth. I explained previously, when he was washing his face and I saw him bleeding, I noticed that.

Q. Did you notice the contusions on his right cheek and right eye? Do you know what contusions means? Black and blue marks.

A. He had bruises on his cheek, yes, but I didn't take a close look at it.

Q. What about his right eye?

A. What was that?

Q. What about his right eye?

A. I don't remember.

(Testimony of **Hugh Whitford.**)

Q. What about his scalp?

A. He may have had injuries on his head. He complained about it. He was sent to the hospital for it.

Q. What I am trying to get at: You, the captain of the police in charge, didn't you check when he complained about his injuries to see whether he was injured or not? [139]

A. I was told about it. That is why he was taken to the emergency hospital. I had him taken up there to be treated.

Q. You walked in with the defendant and Mr. Wells into the house; you are positive about that, aren't you? A. That's right.

Q. And you had Mr. Cavness sit down on a chair in the living room, or Mr. Wells, one of the two of you? The moment you walked into the house you had him sit down in the chair?

A. I didn't have him sit down. Perhaps Mr. Wells did.

Q. You were together?

A. Several other officers. We weren't alone.

Q. Who else? Abbey was there?

A. I remember Paul Shaffer and I believe Sousa. The officers who were there.

Q. All the officers who were there at this trouble at one time, the first time you went into the house they all went into the house, didn't they, that first time?

A. I don't know if they all went in. I believe most of them went.

(Testimony of Hugh Whitford.)

Q. You believe most of them went?

A. That's right.

Q. Do you remember specifically if officer Abbey went into the house or not?

A. I saw him in the house. [140]

Q. You saw him in the house?

A. I saw him in the house.

Q. What about Shaffer? You say you saw him in the house, too? A. I did.

Q. The first time, I am talking about, when you all went in.

A. I don't know whether the first time, but sometime during the time we were there I saw him in the house.

Q. Well, the defendant sat down and his search warrant was read to him by Mr. Wells the first time you went into the house; do you remember that?

A. I remember when Mr. Wells and the defendant were together, yes, when we were in the house. I didn't stay with them. I went a little ways into the living room.

Q. It is a small living room, isn't it?

A. That's right.

Q. A small 8 x 10 or 12; isn't that right?

A. That's right.

Q. So when you were in the corner of the living room, you could see what was going on in the rest of the living room? A. Yes, possible.

Q. Do you remember Mr. Wells reading the

(Testimony of Hugh Whitford.)

search warrant or offering to read it to him? You don't remember that? [141] A. Yes.

Q. You didn't look at the defendant or go up to him and see how he was injured; you didn't do that at all? A. No, I didn't.

Q. In other words, you didn't look at how seriously the defendant was injured at any time; is that right?

A. He appeared all right to me; walking around, moving around.

Q. Wasn't he bleeding on his shirt?

A. Yes, he was bleeding.

Q. Officer Shaffer had a lot of blood on his shirt, too, didn't he? Or did you notice that?

A. I don't remember.

Q. Do you remember his shirt? Do you remember this shirt (indicating)?

A. I don't remember that shirt. I remember seeing a shirt colored like that, of the defendant.

Q. Something similar to this?

A. That's right.

The Court: That has been marked for identification, hasn't it?

Mr. Miho: Yes, your Honor.

The Court: Defendant's Exhibit 1?

The Clerk: Defendant's No. 1, for identification.

Q. (By Mr. Miho): And you say the defendant had both [142] fists tight?

A. I didn't say both fists. I said the right.

Q. Only his right fist?

(Testimony of Hugh Whitford.)

A. That is the only one I could see.

Q. You couldn't see his left fist or wrist at any time?

A. I take that back. In the beginning when he fell down, like I explained previously, when he had both like this (indicating), yes, and when I pulled his hands away, his left hand was on the other side. I don't know whether he had that clenched at that time; but all the time I was hanging onto his right hand. That is the one I remember. He had it clenched all the time.

Q. Did you remember seeing anyone else with a blackjack that day other than Officer Abbey?

A. No, I don't remember.

Q. You don't remember that?

A. I don't remember.

Q. What did Officer Wells tell you when you showed him this Exhibit 3, this broken piece of Vicks tube?

A. Where?

Q. When you first showed it to him, as you say.

A. I don't remember the exact words, but I believe he said, "That is the piece we want," or something to that effect. I don't remember the exact words.

Q. And then he took it out of your hand? [143]

A. What is that?

Q. And then he took it out of your hand?

A. I gave it to him.

Q. You gave it to him?

A. I handed it over to him to take a look at it.

Q. Where did he put it?

(Testimony of Hugh Whitford.)

A. I don't know. I don't remember.

Q. When did he give it back to you?

A. Sometime after that, right after that.

Q. Right after that?

A. Sometime after that, yes.

Q. He didn't keep it with him? He didn't keep it with him?

A. I don't believe he did.

Q. You don't believe he did? Didn't he keep it with him? He never returned it to you? Didn't he keep it with him all the time? Don't you remember that?

A. No, I don't remember.

Q. He might have kept it with him up until he came to the vice squad; isn't that right?

A. I believe he gave it to me and I gave it back to him at the vice squad.

Q. But you are not so sure, are you?

A. I know I had it at the vice squad. I went back and marked it and turned it over to Mr. Wells. [144]

Q. What kind of envelope did he put it in at the vice squad room?

A. I don't remember. I know I was marking the piece I had. There were other officers there I believe were doing the same thing. I marked it and turned it over to him, and I didn't pay any attention to what he was doing. I don't know what envelope.

Q. Were you present at the vice squad when

(Testimony of Hugh Whitford.)

Officer Wells put all these exhibits, pieces by pieces, or one by one, into envelopes? Were you present? You were weren't you?

A. I could have been there, yes.

Q. Don't you remember whether you were present or not when he put these important evidences into envelopes? Don't you remember whether you were there during that procedure or not?

A. I don't remember definitely, but I could have been there.

Q. Can you answer this: Did Mr. Wells put all these exhibits in similar envelopes, similar types of envelopes? A. No, I wouldn't—

Q. You wouldn't know. How long did you search around the yard altogether after the struggle was all over? You searched around for a couple of hours, didn't you, the yard and the house?

A. Yes, we were there about an hour or a little better [145] than that.

Q. Between an hour and a half and two hours; isn't that right?

A. Could be. I am not positive. Could be.

Q. You got to the police station a little after 8 o'clock, didn't you? A. About that time.

Q. Did you see Abbey blackjack the defendant's left hand at any time? A. Left hand?

Q. Yes. A. No.

Q. You didn't see that? A. No.

Q. You only saw Officer Abbey blackjáck the right hand?

(Testimony of Hugh Whitford.)

A. That's right, because I asked him to.

Q. Because you asked him to?

A. To help me open his right hand.

Q. Didn't you also order or request Office Abbey to blackjack and open his left hand?

A. No, I don't remember that.

Q. You definitely didn't do that?

A. I don't remember that.

Q. Did you dig around the back yard of the defendant's house? [146]

A. What was that question?

Q. Did you dig around the back yard, Captain Whitford, of the defendant's house?

A. No, I didn't dig around. I just pushed a few leaves on the side. The yard was covered with leaves.

Q. You didn't see the defendant fall on the bumper of the car at any time, did you?

A. Did I see him fall on a bumper?

Q. Yes. A. No.

Q. Did you see the defendant hit his head on anything at any time?

A. No, I don't remember that.

Q. You never saw the defendant strike anyone at any time or punch anyone at any time, did you?

A. No.

Q. You don't know how the defendant sustained his injuries to his face and to his head, do you? That part you don't recall at all, do you?

A. I don't know.

(Testimony of Hugh Whitford.)

Q. Do you remember anybody calling the defendant "you goddam black son-of-a-bitch," or words to that effect? A. No.

Q. Would you deny that someone said such a thing or could have said such a thing? [147]

A. Oh, they could have, yes.

Q. They could have?

A. The fellows were talking.

Q. The fellows were talking, but you don't recall exactly what was said? A. That's right.

Q. Did you see Officer Shaffer give a choke hold on the defendant at any time, either this way or this way (indicating)? Officer Shaffer?

A. No, I don't remember that.

Q. You don't remember that? A. No.

Q. How long did the so-called subduing take altogether, about four or five minutes, I guess?

A. Four or five minutes.

Q. You are sure, aren't you, Captain Whitford, as the man in charge, that all six of you officers there engaged in the subduing of the defendant? Of that part you are sure, aren't you? You, Sousa, Sasaki, Wells, Shaffer; yourself, Shaffer, Sousa, Sasaki, Mr. Wells, and Abbey, all six of you took part in the subduing of this defendant; of that part you are sure, aren't you?

A. Well, we were all there. I believe they took part in it, too. I only can speak for myself, Mr. Wells, Sousa, I saw him there, and Abbey. Shaffer, I don't remember. Sasaki, [148] I presume he was there, too.

(Testimony of Hugh Whitford.)

Q. As to exactly what each officer did you are not quite sure? A. No.

Q. Excepting some of Abbey's, I believe. Captain Whitford, going back to when you first came to the scene, do you remember seeing the defendant with his left hand on the door handle as he opened the door? Do you remember seeing that?

A. No.

Q. Was the door already open?

A. No, I don't remember. I couldn't see.

Q. You couldn't see that?

A. No. When I came around they were away from the car already.

Q. They were away from the car already?

A. They were a little ways off from the car.

Q. Do you remember if the defendant had anything like a key in his right hand or not, or with his right hand extended toward the switchboard or not?

A. No, I don't remember that.

Q. You don't remember that? A. No.

Q. Do you remember, Officer Whitford, whether after it was all over you decided to go back to the police station, [149] whether you and your officers went to look for the defendant's keys on the grounds or not? Do you remember searching for his keys on the ground, the keys to the car that you confiscated?

A. No, I don't remember that either.

Q. Do you remember if Officer Wells went out and searched for the car keys or not?

(Testimony of Hugh Whitford.)

A. No, I don't remember that.

Q. You don't remember that at all?

A. No.

Q. Would you deny you had some trouble looking for defendant's car keys on the ground?

A. No, I don't deny it. I don't know. Like I say, it could have been; I don't remember it.

Q. You were there when the car was taken away, weren't you?

A. I don't believe I was. I believe I left there before the car was taken away.

Q. But you don't remember who went to search for the defendant's car keys? You don't remember?

A. No, I don't remember that.

Q. Well, the car keys were not in the car; is that right? That part you are sure of?

A. No, I don't know of that either.

Mr. Miho: One more question. No further questions, [150] your Honor.

The Court: Redirect examination.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: We will take our next recess, and have your next witness ready.

(Recess had.)

Mr. Miho: If your Honor please, at this time may we be permitted to recall Captain Whitford for one last question?

The Court: Any objection to this witness sitting here momentarily?

Mr. Miho: None at all.

The Court: Or just stand outside the door. Maybe that would be enough.

HUGH WHITFORD

resumed the stand and testified further as follows:

Cross-Examination (Continued)

By Mr. Miho:

Q. Captain Whitford, you have been sworn; I would like to ask you: This Vicks inhaler tube, the portion of it that you obtained at the scene that we referred to and have been talking about——

The Court: Exhibit 3. [151]

Q. (Continuing): You marked it yourself at the vice squad station, you said, didn't you?

A. That's right.

Q. And you put your initials and the date and the time; is that right? A. That's right.

Q. And the time was what time? The time you gave it to Mr. Wells at the vice squad station?

A. No, the time I picked it up.

Q. Where? A. At the scene.

Q. At the scene? A. That's right.

Q. At the time you marked it, you marked it in your vice squad room; is that right?

A. That's right.

(Testimony of Hugh Whitford.)

Q. And that was eight o'clock, or after eight, anyway? A. About 8.

Q. When you said on this "5:45 p.m.," you were just guessing at the time you picked it up at the scene; is that right?

A. What do you mean guessing? That is the time at the scene.

Q. Guessing the time you picked it up at the scene. A. 5:45 p.m. [152]

Q. In other words, you marked 5:45 p.m.

A. That's right.

Q. Where did you get that idea, 5:45? What made you put 5:45 on there?

A. That is the time I picked it up.

Q. At the scene? A. That's right.

Q. What time did you make the raid?

A. About 5:40, somewhere around there.

Q. 5:40? A. Yes.

Q. You looked at your watch and you figured 5:45 was about the time you picked up this stuff?

A. That's right.

Q. Actually you were guessing, weren't you?

A. Guessing?

Q. Yes.

A. I didn't need to guess. I had a watch with me. I knew the time.

Q. You were guessing at the time you marked it at 8 o'clock at the police station; isn't that right?

A. I was not guessing at the time. I had the time that I picked it up. That is the time I wanted to mark on this article here.

(Testimony of Hugh Whitford.)

Q. Did you tell us the other day that the struggle [153] might have continued five, ten, or fifteen minutes? Didn't you tell us that the other day?

A. I may have said that, yes.

Q. Well, when you say you picked up this stuff, Exhibit 3, after the struggle was over, after the struggle was over it was a minimum of five minutes or maximum of fifteen minutes; is that right? Or twenty minutes?

A. I said I took this thing out of his hands after we got his hands open. I got hold of it and took it from him, and then the struggle ceased right after that, shortly after that. That is what I recollect saying.

Q. You still say you weren't guessing?

A. No, I was not guessing.

Q. 5:45 is the time exactly when you picked it up?

A. That's right.

Mr. Miho: That is all.

Mr. Hoddick: No questions.

The Court: You are excused again.

(Witness excused.)

The Court: Call the next witness.

ALFRED A. SOUSA

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name, age, residence, occupation and citizenship. [154]

(Testimony of Alfred A. Sousa.)

The Witness: Alfred A. Sousa, 31 years of age, American citizen.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Do you reside here in Honolulu?

The Witness: I do, sir.

The Court: Your occupation is——

The Witness: Sergeant in the vice squad.

The Court: Honolulu police department?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Sousa, how long have you been in the Honolulu police department?

A. About four years.

Q. And how long have you been assigned to the vice division? A. About three, sir.

Q. Do you know the defendant, Orestus Cavness? A. I do, sir.

Q. Will you identify him, please; point him out?

A. (Indicating): There is Orestus Cavness.

Q. The man on the end of the bench?

A. That's right, sir. [155]

The Court: What bench?

Mr. Hoddick: May the record show he has identified defendant. The end of Counsel table.

The Court: Yes.

(Testimony of Alfred A. Sousa.)

Q. (By Mr. Hoddick): Mr. Sousa, did you have occasion to make a raid on the defendant's house any time in July, 1949?

A. Yes, I did.

Q. And just when was that raid made?

A. July 19, 5:40 p.m.

Q. And where were you immediately prior to the making of the raid?

A. Reserve Officer Abbey's home.

Q. And where is Reserve Officer Abbey's home?

A. Right across the street from the defendant's home.

Q. What is the defendant's address?

A. 3811 Leahi Avenue.

Q. How long had you been in Officer Abbey's home prior to making the raid?

A. Several hours.

Q. Who was there with you?

A. The rest of the raiding party.

Q. Do you remember their names?

A. Agent Wells, Officer Shaffer, Sergeant Sasaki, Captain Whitford, Officer Abbey, and myself.

Q. Will you describe to the Court and jury what happened [156] after the raiding party left Officer Abbey's house at approximately 5:40 p.m. on July 19, 1949.

A. What everyone did, sir?

Q. Yes, what you saw.

A. I seen the defendant drive in his driveway.

(Testimony of Alfred A. Sousa.)

Agent Wells went out of the house first, approached the car on the driver's side, which is the left side of the car. I was about eight feet or more behind Agent Wells, and I could see him with his left hand out, having his badge in his left hand and a piece of paper in his right, approach on Calvet's side of the car.

Q. Whom do you mean by Calvet?

A. Cavness, the defendant, sir. The door was partly open, as far as I recall. I noticed Cavness come out of the car and shove Agent Wells.

Q. Do you remember which hand he shoved Wells with? A. With his left hand, sir.

Q. And do you remember what part of Wells' body he shoved?

A. It was the upper portion of Agent Wells. I don't know what the exact spot would be.

Q. Do you remember what result that shove had on Wells?

A. Agent Wells lost his balance, but at no time did Agent Wells lose contact, as far as I could see, with the defendant. [157]

Q. And what did you do when you saw the defendant shove Mr. Wells?

A. I immediately ran toward the defendant and grabbed his right arm. There was a tussle there. The defendant fell and got up again. He went to the front of the car, fell there, came pretty close to the bumper and fender of the car. He stood up, and in the meantime Captain Whitford came by,

(Testimony of Alfred A. Sousa.)

and we all struggled to subdue the defendant.

Q. Did the defendant hit the car when he fell?

A. Very possible that he did. I did not see it. It is very possible that he could have hit the car.

Q. Go ahead.

A. The struggle lasted a matter of three or four minutes, maybe longer, maybe less. In the meantime the rest of the raiding squad had arrived at the scene.

Q. What do you mean "the rest of the raiding squad"?

A. The other boys besides Captain Whitford, Agent Wells, and myself.

Q. You mean the other boys who were in Abbey's house?

A. That's right, sir. I remember Agent Wells saying, when Calvin first got out of the car, that he had it in his right hand.

Q. That is when you were running up to assist?

A. That is when I was running up to the car behind Agent Wells, and I grabbed his right hand, and he tried to put his [158] right hand up towards his mouth, to the front of his face, that motion (indicating), with his hand up.

Q. You say the struggle lasted for three or four or maybe more minutes?

A. That's right.

Q. Did you and the other officers have any difficulty in subduing the defendant?

A. Yes, we did; the defendant was very powerful. It seemed to me that the defendant was "hopped up."

(Testimony of Alfred A. Sousa.)

Mr. Miho: I move that answer be stricken, if your Honor please.

The Court: Definitely.

Mr. Miho: It being highly prejudicial, entirely uncalled for, and unresponsive, and unfair.

The Court: Definitely it may go out, and the jury is instructed to disregard it. Just answer the question that is asked you.

Mr. Miho: And I would like to reserve any motion at this time for any motion for a mistrial, if your Honor please.

The Court: Well, what do you mean "reserving it"?

Mr. Miho: If I decide after conference with my associate that it merits my asking for a mistrial, his making that statement, at this time, I would like the opportunity to make it at a later time. [159]

The Court: You may, but I would like you to make up your mind by tomorrow morning as to what you wish to do on that score.

Q. (By Mr. Hoddick): What happened after the defendant was subdued?

A. After the defendant was subdued?

Q. What did you do?

A. Well, I kept holding onto him as he was trying to get away at all times during the struggle. I don't know exactly what part of the body I was hanging onto after the struggle had begun. I know I was in contact with him practically all the time.

Q. And what did you do after he was subdued?

(Testimony of Alfred A. Sousa.)

A. After he was subdued and handcuffed, then I went to Officer Abbey's house and called the rest of the searching party to come over. They arrived shortly after.

Q. You called them on the telephone?

A. I called them on the telephone, yes, sir.

Q. When you got back over to the defendant's house, where was the defendant, and the other officers?

A. Will you repeat that again, sir?

Q. When you went back to the defendant's house from Abbey's house after having made the telephone call to the other members of the party, where was the defendant and where were the officers? [160]

A. The defendant was out in the yard and the officers also was out there.

Q. And were all the officers there?

A. As far as I recall.

Q. And what were they doing in the yard?

A. They were standing around the capsules that was in the yard there.

Q. Did you see anybody pick those capsules up?

A. No, I don't remember who picked them up.

Q. Did the party go in the house after that?

A. Yes, sir.

Q. At that time was the defendant formally placed under arrest? A. I don't remember.

Q. You don't remember. Did you participate in the search of the premises?

(Testimony of Alfred A. Sousa.)

A. Yes, very little.

Q. Did you find anything?

A. No, I didn't.

Q. Did you go down to the vice squad with the other officers? A. Yes, I did.

Q. After the raid? A. Yes, I did.

Q. About what time was that? [161]

A. That was about an hour after.

Mr. Hoddick: Could I have a moment of the Court's time, please.

The Court: Yes.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Officer Sousa, you are no expert on narcotics, are you? A. I don't claim to be, sir.

Q. You are just a plain officer of the law in the Honolulu Police Department; is that right?

A. I am an officer of the law, yes, sir.

Q. In the vice squad? A. Yes, sir.

Q. When you went up to Officer Abbey's house, how many of you went to his house?

A. The ones that I mentioned a little while ago.

Q. Six of you altogether?

A. If that was six, yes.

Q. And you stayed at the house for about two hours or more or less?

A. About that, sir.

(Testimony of Alfred A. Sousa.)

Q. You had some drinks in that house? [162]

A. Water.

Q. What is that? A. Water.

Q. Ice water? A. Ice water, tap water.

Q. How tall are you, Officer Sousa?

A. Six and one-fourth, sir.

Q. How many pounds do you weigh?

A. A little over 200 pounds.

Q. A little over 200 pounds?

A. Yes, sir.

Q. You are not afraid of any man, living or dead, are you? A. I am not.

Q. You were well on that day of the raid, as you call it? A. Yes.

Q. You weren't sick or anything?

A. No, sir.

Q. You were eight feet behind Agent Wells as he went towards the defendant?

A. Approximately, sir.

Q. You were the first officer behind Agent Wells?

A. There was—Well, may I answer different. There was Captain Whitford behind Agent Wells, and I was on the left, [163] as far as I recall, of Agent Wells.

Q. Where was Captain Whitford?

A. Captain Whitford was behind Agent Wells when they came out of the house.

Q. Where was he as you got into the defendant's yard?

(Testimony of Alfred A. Sousa.)

A. Captain Whitford went to the right of the car.

Q. Right of the car? A. Yes, sir.

Q. And Agent Wells went to the left of the car? A. That's right.

Q. And you were behind Agent Wells about eight feet? A. That's right.

Q. There was no one between you and Agent Wells at the time you proceeded into the defendant's yard? A. That's right.

Q. And as Agent Wells went up to the defendant's left front door, you were still about six to eight feet behind Agent Wells?

A. About that, sir.

Q. At that time, as Agent Wells went up to the defendant's left door and as the defendant came, it all occurred almost simultaneously; **is that right?**

If I may go over that again: You saw the defendant drive into his driveway and then you all came out. Agent Wells proceeded toward the front of the defendant's car. Defendant's [164] car stopped. Agent Wells reached the front just about the time the defendant stopped his car; **is that right?**

A. That is close enough.

Q. And then you saw the defendant's door open, didn't you? A. That's right.

Q. And you saw the defendant's left foot come out, partially out of the front door?

A. No, I didn't see it coming out. When I noticed, his foot was outside already.

(Testimony of Alfred A. Sousa.)

Q. When you noticed, his foot was outside already?
A. Yes, sir.

Q. At that time did you see the defendant with his left hand on the door handle, or any part of that left front door?

A. That I don't remember, sir.

Q. You don't remember?
A. No, sir.

Q. Agent Wells was not the one who opened the defendant's left front door, was he?

A. Not that I recall.

Q. And you were in a position to see everything clearly, what Agent Wells did, weren't you?

A. Just about, sir.

Q. So you are positive Agent Wells was not the one who opened the defendant's left front door? You are sure of that [165] point, aren't you?

A. Will you repeat that question?

Q. You are sure Agent Wells never opened the defendant's left front door; isn't that right?

A. I couldn't say, because I didn't see.

Q. Weren't you in a position right behind Agent Wells, six to eight feet, in a position to observe what Agent Wells was doing?

A. That's right, sir.

Q. And still you don't know whether he opened the left front door of the defendant's car?

A. That's right, sir.

Q. You are not sure; is that what you are trying to tell us?
A. I didn't see it.

Q. I am asking you whether Agent Wells opened that door or not.

(Testimony of Alfred A. Sousa.)

A. Well, if I didn't see it, I don't know whether he did or not.

Q. So when you saw anything, the door was already open? A. That's right, sir.

Q. Did you see the defendant's left hand on the door handle? A. No, sir.

Q. Did you see his left hand on the door at any portion? [166] A. No, sir.

Q. You didn't. Did you see the defendant's right hand extended to the front?

A. As the defendant came out of the car, I seen the defendant's right hand go up towards his face.

Q. Towards his face? A. That's right.

Q. He was already out of the car at that time?

A. Practically all out.

Q. And you grabbed his right arm; right?

A. Yes, when I reached him.

Q. You were the first to grab his right arm?

A. Yes, when Agent Wells said he had it in his right hand.

Q. But you were the first to grab the defendant's right arm. A. Yes, sir.

Q. And you say that one of the first things you noticed was defendant pushing Agent Wells?

A. Shoved him.

Q. Shoving him. You show us how he shoved him, with your left hand.

A. (Indicating).

Q. Toward the front this way (indicating), or toward the side? [167]

(Testimony of Alfred A. Sousa.)

A. Defendant was sitting in his car this way (indicating), and as he came out, that motion (indicating).

Q. He shoved him like that?

A. That's right.

Q. What part of Mr. Wells' body?

A. Upper portion. I don't know whether it was there (indicating) or here (indicating), or on the neck, or in the middle of the chest, some upper part.

Q. He pushed him through the car door, the open part?

A. No. By the time the defendant came out of the car, the door was open and he shoved Agent Wells.

Q. You are sure the door was not the part that hit Agent Wells?

A. No; I am sure of that.

Q. Of that part you are sure?

A. Yes, sir.

Q. The rest you are not?

A. I am sure of everything I said.

Q. You are sure of everything you said excepting what you don't know; is that right?

A. That is right.

Q. Or what you don't want to know?

A. What I don't know, I don't know, sir.

Q. Are you sure that this man here shoved Agent Wells somewhere on his body? [168]

A. That's right, sir.

(Testimony of Alfred A. Sousa.)

Q. And Agent Wells staggered bodily, fell off balance, you say?

A. He was off balance.

Q. How many feet did he go off balance?

A. A matter of one foot, two feet.

Q. A matter of one foot, two feet. What do you mean, that Agent Wells never lost contact at any time with the defendant?

A. I meant that Agent Wells was with the defendant at all times.

Q. What do you mean "lost contact," that he never "lost contact" with the defendant?

A. That is right. Part of his body was in contact with the defendant's body.

Q. You mean Agent Wells was hanging onto the defendant's arm at all times?

A. I don't know whether he was hanging to his arm, his coat, his shirt, his pants, but I know he didn't lose contact. They were close together.

Q. Close together? A. That's right.

Q. And you were hanging onto the defendant's right arm by that time?

A. That's right, sir. [169]

Q. How did you hold his right arm? You demonstrate on me.

A. Do you want me to demonstrate again?

Q. Defendant was out of his car?

A. That's right, sir.

Q. And defendant was facing which way, if the car was here (indicating)?

(Testimony of Alfred A. Sousa.)

A. The car facing makai.

Q. So the jury can see better, let's say the car was facing this way (indicating).

A. Let's say this is the Koko Head Ewa (indicating). The driveway runs makai. All right, he got out of the car this way (indicating) in stooping position. I ran up and grabbed his hand in this position (indicating).

Q. Well, similar to that. The similar part or the whole part?

A. I don't know exactly. I grabbed his right hand. I don't know whether it was this way (indicating) or this way (indicating) but he shoved his right hand up towards this way (indicating).

Q. Then what did you do next?

The Court: Speak louder.

A. As I grabbed his right arm, he went down on his knee.

Q. You didn't push him by any chance? [170]

A. I didn't push him, but when I grabbed him, by my force naturally we went forward.

Q. Then what happened?

A. He stood up again and came towards the front of the car again. I still hung onto him and went down again, and at that time I don't know what part of his body I held. Captain Whitford came. He struggled.

Q. Did he hit the bumper with his head?

A. Very possible. I don't know whether he did or not.

(Testimony of Alfred A. Sousa.)

Q. But you are not dead sure? A. No, sir.

Q. And Captain Whitford came to the rescue?

A. That's right.

Q. What did Captain Whitford do?

A. What he did I don't know.

Q. Don't you? A. No, sir.

Q. Didn't Captain Whitford grab hold of his right arm, too? A. Probably did.

Q. But you are not sure?

A. I don't know what Captain Whitford did.

Q. You don't know what Captain Whitford did at all?

A. I know he was there on the raid and assisted the rest of us, Agent Wells and myself, to subdue the defendant, but [171] I don't know what part of his body Captain Whitford grabbed the defendant.

Q. You don't know whether Captain Whitford grabbed hold of the defendant's right arm, together with you, or not? A. No.

Q. You don't know that? A. No, sir.

Q. Did he or didn't he?

A. I can't answer that. I don't know.

Q. You don't know, but you are sure you were grabbing onto the defendant's right arm?

A. I know what I was doing.

Q. You grabbed hold of his right arm?

A. Right.

Q. Defendant finally went flat on his stomach; is that right? A. Yes, he fell.

(Testimony of Alfred A. Sousa.)

Q. Flat on his stomach?

A. That's right.

Q. Agent Wells was still hanging onto his left arm?

A. I don't know.

Q. You don't know that either?

A. No.

Q. What was Sasaki doing, by any chance?

A. I don't know. [172]

Q. What was Abbey doing, by any chance; you don't know that either?

A. No, sir.

Q. Did any of these other officers take part?

A. Sure, they all did.

Q. But you don't know what they did?

A. No.

Q. You don't know who hit him on the back of his head, if anybody did?

A. No, sir.

Q. You didn't do that?

A. No, sir.

Q. You didn't see anybody punch him on his face?

A. No, sir.

Q. Maybe he punched his face on the bumper; is that right?

A. Could be.

Q. Or the coconut tree?

A. Could be.

Q. He had contusions on his right cheek, didn't he? Bruises on his right cheek and right eye?

A. That I don't know. I know as far as the picture I see in front of me now, he had a bruise below his left cheek, right about here (indicating).

Q. Are you sure it was the left cheek? [173]

A. As far as I can see in my mind.

Q. That bruise was there, but you don't know how he got it?

A. No, I don't.

(Testimony of Alfred A. Sousa.)

Q. But you didn't do it?

A. He must have got it in the struggle. But I say he put up a very good struggle.

Q. Very good struggle?

A. Very good. He put up a very good struggle.

Q. You never saw him hit anybody, did you, or punch anyone?

A. The defendant?

Q. Yes.

A. Not that I recall, sir.

Q. He just struggled?

A. That's right.

Q. Struggled against you six small men, six small—I mean pretty big men?

A. He was very powerful.

Q. You hung onto his right arm. He was flat on his back. You don't know what the other officers did, especially what Captain Whitford did, but anyway you were hanging onto his right arm?

A. I was hanging onto his right hand, but as I say, after he fell about the second time, as I mentioned here, I had some [174] part of his body.

Q. You let go of his arm at that time?

A. I don't recall that. I might have hung on his right hand, I might have had him by the shoulder with my one hand on his right hand. Everything happened so fast, and action was taking place all the time.

Q. Do you remember seeing anyone blackjack his right hand, or don't you recall that?

A. No, I don't recall that.

Q. Did you have a blackjack in your hand on that day?

(Testimony of Alfred A. Sousa.)

A. No, I didn't have no blackjack with me that day.

Q. You vice squad men ordinarily go around carrying blackjacks; you are authorized to carry blackjacks? A. Sure.

Q. But on that day you didn't have any?

A. No.

Q. Brass knuckles? A. No, sir.

Q. You don't know what happened after you let go of his right arm; you just know you hung onto some part of the defendant's body?

A. That's right, sir.

Q. And that he was subdued soon after that?

A. Yes.

Q. Did you see anybody pick anything out of either one [175] of his hands?

A. Pick something out of his hands?

Q. Did you see anyone pick anything out of his hands at all on that occasion? A. No, sir.

Q. Did you see someone pick something up from the ground later on?

A. I know something was on the ground later on. I don't know who picked it up.

Q. Did you see this at the scene at any time, referring to Exhibit 3, your Honor?

A. That's right, sir.

Q. Who picked that up? You? Take a good look at it. Take all the time you want.

A. I think it was Captain Whitford.

Q. He picked that up? Was it after the struggle was over, or not?

(Testimony of Alfred A. Sousa.)

A. Just about the time the struggle was over.

Q. He picked it out of the ground; is that right?

A. I don't recall that. I don't know.

Q. You don't know. But you are sure you saw him pick up this particular piece?

A. I seen Captain Whitford with it.

Q. Pick it up?

A. Well, I don't know whether he picked it up or took [176] it out of his hand.

Q. If he picked it out of his hand, you could have seen it; you were in a position to see it, weren't you? A. No, sir.

Q. You don't know. You don't know whether Captain Whitford picked it off the ground or not, either? A. No, sir.

Q. But you are sure Captain Whitford——

A. I seen Captain Whitford with it.

Q. (Continuing): ——picked it up at the scene?

A. I seen Captain Whitford with part of the inhaler.

Q. Where was the first time you saw Captain Whitford with part of this inhaler?

A. Right in the defendant's yard.

Q. Yard or house? A. Yard.

Q. Yard? A. Yes, sir.

Q. After the defendant had already been subdued? A. Yes, sir.

Q. Did he say anything at that time?

A. Who, sir?

(Testimony of Alfred A. Sousa.)

Q. Whitford. A. I don't remember.

Q. Now, when you say that you saw someone, when you [177] went to call the rest of the vice squad gang and you came back from Abbey's house to the scene, you saw all of the officers gathered around by the coconut tree or near it?

A. Some of the officers were still outside.

Q. And you saw who pick up what?

A. I don't know who picked it up.

Q. Picked up what? A. The capsules.

Q. You don't know who picked it up?

A. I don't remember. I know someone did, but I don't know who did.

Q. You were right there? A. Yes.

Q. But you don't know who picked it up?

A. Yes.

Q. But you are sure all of the officers were there, all six of you? The rest of the officers hadn't joined you yet, Roberts and the rest of them?

A. No.

Q. Do you remember whether Captain Whitford had this Exhibit 3 in his hand at that time, or whether he picked it off the ground at that time?

A. No, I don't recall that.

Q. In other words, you don't know when Captain Whitford picked this up? [178]

A. That's right.

Q. You don't know who picked up the six capsules; right? A. At that time, no, sir.

Q. When was the next time you saw this Exhibit 3, part of that inhaler I just showed you?

(Testimony of Alfred A. Sousa.)

A. Right outside in the yard.

Q. When was the next time you saw it? Where was it when you next saw that part of the inhaler tube?

A. I seen it right along.

Q. Who had it?

A. As far as I know, Captain Whitford.

Q. Was he showing it around to people?

A. Yes.

Q. To the officers?

A. Yes, sir.

Q. At the scene?

A. At the scene.

Q. In the house?

A. Very possible.

Q. At the police station?

A. That I don't know.

Q. He never gave this piece to you at any time for personal and closer observation, did he?

A. Not that I recall.

Q. He never gave this Exhibit 3 to Mr. Shaffer, by any [179] chance, handing it over like that (indicating) for close observation, did he?

A. I don't know, sir.

Q. You don't know?

A. No, sir.

Q. Did he give this to Agent Wells for close observation, or for any other purpose?

A. Possibly.

Q. At the scene?

A. Possible, sir.

Q. Possible?

A. Yes, sir.

Q. But you don't know that either?

A. No, sir.

Q. The defendant was handcuffed soon after he was subdued?

A. That's right, sir.

(Testimony of Alfred A. Sousa.)

Q. By whom? A. I don't remember.

Q. Was he handcuffed to anyone, do you remember?

A. No, sir, out in the yard he was not.

Q. What is that?

A. Out in the yard he was not.

Q. He was not handcuffed in the yard at any time? A. Not to anyone else.

Q. Was he handcuffed to himself? [180]

A. Yes, sir.

Q. In what position? Like I am here (indicating)? A. That's right, sir.

Q. Did you notice any bleeding on the back of his head at that time?

A. No, not at that time. I noticed the bleeding on his lips.

Q. But you never noticed the bleeding on the back of his head? A. Not at that time, sir.

Q. Who brought him into the house? Officer Abbey? Agent Wells? Captain Whitford?

A. I know Agent Wells took him to the house.

Q. Captain Whitford, too?

A. And Captain Whitford went in the house, yes.

Q. And how about Sasaki?

A. I don't remember who else went in, sir.

Q. There were more than two officers that went into the house; isn't that right? A. Yes.

Q. Did Officer Abbey go to the house, too?

A. I don't know.

(Testimony of Alfred A. Sousa.)

Q. Did you go into the house?

A. Yes, after a while.

Q. After what while? [181]

A. About five minutes.

Q. After you made the call?

A. After I made the call, and I still stayed outside.

Q. Well, did you go into the house after you made the call? When was the first time you went into the house, soon after Cavness was handcuffed after being subdued?

A. When Cavness was subdued, that is when I went to make the 'phone call.

Q. Right after that you immediately went to make the 'phone call? A. Yes.

Q. How long did that operation take?

A. Two or three minutes; maybe less.

Q. How far is Abbey's house from the defendant's house? A. Across the street.

Q. How many feet from where you are sitting? To the end of that building (indicating)?

A. Maybe a little less than that.

Mr. Miho: Will you stipulate, Mr. Hoddick, it is about a hundred feet.

Mr. Hoddick: I don't know how far it is, Mr. Miho.

Q. (By Mr. Miho): It is about a hundred feet, isn't it?

A. I don't know how many feet, but it is not that far, not right to the end of the building there. It is about three-quarters way. [182]

(Testimony of Alfred A. Sousa.)

Q. Well, anyway, it is longer than from that wall to this wall? A. Naturally.

Q. About half as long as it is from that distance from one wall to the other?

A. This wall to the other and a little more.

Q. Half that? A. About that, sir.

Q. And you did that, back and forth in making the 'phone call, in two minutes or less?

A. About three minutes or less.

Q. And then you came back and you saw these officers standing around where the struggle had occurred? A. Yes.

Q. And the defendant was there? A. Yes.

Q. And then Shaffer or someone picked up something?

A. I don't recall who picked up something at that time.

Q. Are you sure it was at that time someone picked up something?

A. I seen the capsules down myself on the ground.

Q. You saw them yourself? A. Yes.

Q. The six capsules?

A. Capsules. I don't recall how many at this time. [183] The capsules were down on the ground.

Q. What part of the ground?

A. What do you mean, "What part of the ground"?

Q. What part of the ground? What part of the ground?

(Testimony of Alfred A. Sousa.)

A. I don't quite follow you there, sir.

Q. Where did you see these capsules?

A. On the ground.

Q. Where? What part of the ground?

A. You mean on the grass? On the dirt?

Q. Yes. A. On the grass.

Q. On the grass? A. Yes.

Q. In front of the car?

A. If I recall correctly, it was on the side of the car.

Q. Inside of the car? A. Beside the car.

Q. Beside the car? A. Yes.

Q. Right by the front door?

A. One door, yes, approximately right by the door.

Q. The front left door? A. Yes.

Q. That is where you found them? That is where you saw [184] them the first time?

A. As I say, I am not too positive about that, but I know it was down on the ground.

Q. Down on the ground? A. Yes.

Q. What else did you see, by any chance?

A. I saw the part of a Vicks inhaler tube right next to the coconut tree.

Q. You mean this part here, Exhibit 3?

A. No, sir.

Q. Which part? Any particular part of the Vicks inhaler tube? These pieces here? Take a good look at it. Take it out. A. No.

Q. Not these pieces? A. No, sir.

(Testimony of Alfred A. Sousa.)

Q. Did you see these pieces, Exhibit 1, at any time at the scene?

A. Yes, I seen those at the scene.

Q. Where did you first see them?

A. On the ground. Someone's hand.

Q. Well, the first time you saw it was where?

A. I don't recall.

Q. Who picked these up? Did you?

A. No, sir. [185]

Q. Who picked them up?

A. According to that it is Paul Shaffer.

Q. According to this, Paul Shaffer. You saw the initials? A. That's right, sir.

Q. Is this the piece you mean that you saw there? A. Yes.

Mr. Miho: May the record show he refers to Exhibit 2.

The Court: Is that the whole exhibit?

The Clerk: 2-B.

Mr. Miho: 2-B.

The Court: Is that the whole exhibit?

The Clerk: There are three parts.

The Court: What is the third part?

The Clerk: The laboratory card.

Q. (By Mr. Miho): Is that the piece?

A. Yes.

Q. You saw the capsules—When you saw the capsules, you saw this piece at the same time?

A. This was inside.

Q. Yes, this was inside.

(Testimony of Alfred A. Sousa.)

The Court: Speak louder, please.

The Witness: The capsule was inside.

Q. (By Mr. Miho): You saw this and you saw the six or [186] four, whatever capsules, some capsules lying close to each other?

A. No, this was by the coconut tree.

Q. Where were the other pieces?

A. Oh, a matter of maybe about three feet away.

Q. Three feet away?

A. Three or four feet.

Q. By the side of the front left door?

A. Side of the car, yes, sir.

Q. Who picked this up, Exhibit 2-B?

A. Officer Abbey.

Q. Officer Abbey picked it up?

A. Yes, sir.

Q. That you remember?

A. That I remember.

Q. And what did he do after he picked it up?

A. He didn't pick it up. He called Agent Wells, that inhaler tube right by the coconut tree.

Q. Agent Wells was in the house, you mean, at that time? Where did he call him from?

A. I think Agent Wells was out in the yard at that time when he pointed to the cap at the bottom of the coconut tree.

Q. Mr. Sousa, you weren't even around when Officer Abbey saw this particular piece, Exhibit 2-B? [187]

A. Sure, I was around.

(Testimony of Alfred A. Sousa.)

Q. And you say he called for Agent Wells?

A. That is the regular routine.

Q. I am not talking about any regular or irregular routines. I am asking you what happened on that occasion.

A. Yes, sir, he called Agent Wells.

Q. And where did Agent Wells come from, if you saw that?

A. I don't know where he came from.

Q. You don't know where he came from?

A. No, sir.

Q. But Agent Wells came?

A. That's right, sir.

Q. And Agent Wells picked it up; is that right?

A. As far as I know, Officer Abbey—He called Agent Wells, and Officer Abbey picked it up and handed it to Agent Wells.

Q. Handed it to Agent Wells?

A. As far as I recall, yes.

Q. You never saw Officer Abbey put this Exhibit 2-B in his pocket or any place on his person?

A. No, sir.

Q. He just handed it over to Agent Wells?

A. That's right, sir.

Q. That is the last you saw? [188]

A. Yes, sir.

Q. What else did you see?

A. What else?

Q. Yes, if anything.

A. I don't remember.

Q. What is that?

A. I don't remember.

(Testimony of Alfred A. Sousa.)

Q. All right. Then what did you all do? You saw these six capsules, or five capsules, or four—you don't know how many you saw—then you saw somebody pick them up—you don't know who picked them up.

A. That's right.

Q. You saw this other Exhibit 2-B; you say you saw it; Abbey called Agent Wells, who came from some place; Abbey picked it up handed it over to Agent Wells; and that is the last you saw of that Exhibit 2-B?

A. That is what I recall.

Q. Just the part with the so-called annexed capsules stuck together?

A. That's right, sir.

Q. When was the next time you saw Exhibit 2-B?

A. I don't remember.

Q. Weren't you at the police station in the vice squad room?

A. Yes, sir.

Q. Weren't you there when Agent Wells was putting these [189] exhibits into different envelopes?

A. Yes, now I recall it.

Q. And where did you see Agent Wells pick that 2-B out of, that important piece, as you call it, of evidence; where did you see him get it out of; what pocket?

A. I don't remember that, sir. I don't remember what pocket.

Q. But did you notice Agent Wells putting that particular piece in an envelope?

A. No, I don't remember that.

Q. You don't remember that?

A. I don't know what envelope he put it in. I don't recall him putting it into an envelope.

(Testimony of Alfred A. Sousa.)

Q. Do you recall seeing Agent Wells putting anything in an envelope in your presence at the vice squad room, in Captain Whitford's office?

A. No, sir, I probably forgot about it.

Q. You probably forgot about it?

A. That's right, sir.

Q. But you were there? A. I was there.

Q. But it is a complete blank to you what Agent Wells did with relation to these exhibits?

A. That's right, sir.

Q. You don't know who handed him what exhibit, what [190] part of his body or pocket he pulled it out of? A. That's right, sir.

Q. You never saw Abbey give him anything at the police station, at Captain Whitford's office?

A. Not that I recall.

Q. Did you see Shaffer give anything to Agent Wells at the police station? A. I don't recall.

Q. Did you see Captain Whitford give him anything at the police station?

A. I don't know that.

Q. Would you deny one way or the other? Tell us.

A. If I don't know, I can't tell you one way or the other.

Q. You just don't know?

A. That's right, sir.

Q. But you saw Agent Wells putting stuff in an envelope, in envelopes, different kinds of envelopes, at the vice squad room; do you remember that?

(Testimony of Alfred A. Sousa.)

A. I don't know whether I did or not, sir.

Q. Well, you said a while ago you were there.

A. Yes, I was there, yes, sir.

Q. You were there?

A. I was at the vice room.

Q. And you saw Agent Wells putting exhibits into [191] different envelopes?

A. I don't remember that, sir. You recall, sir, the vice room has different partitions.

Q. I haven't seen your new, exclusive headquarters, Officer. You have a new one now, a higher class one than the one you used to have before. You have a new building, haven't you? The old one burned down, didn't it?

A. That's right, sir.

Q. Officer Sousa, you remember the mock orange fence that is on the front of Cavness' house?

A. You mean the hedge, sir?

Q. Yes, mock orange hedge.

A. That's right, sir.

Q. How tall is that hedge? About as tall as you are; is that right?

A. Maybe a little taller.

Q. Maybe a little taller? A. Yes, sir.

Q. And all interwoven and thick; is that right?

A. It is pretty thick, yes, sir.

Q. Could you walk through that hedge, or either part of that hedge, left part or right part of that hedge? Could you walk through it? You can't, can you?

A. Not without a struggle.

(Testimony of Alfred A. Sousa.)

Q. Your clothes would probably be torn up, wouldn't [192] they?

A. I wouldn't say that, sir.

Q. It is pretty thick, isn't it?

A. It is pretty thick.

Q. Would you dive through that hedge? Could you? Do you think you can dive through that hedge? A. Sure.

Q. You can? A. Sure.

Q. What part of that hedge? A. Any part.

Q. And come out standing up from the other side? A. That I don't know.

The Court: Excuse me. Are you going to have many more questions? The reason I ask is that if you have just a few, we can stay and finish with this witness, unless Mr. Hoddick has further questions.

Mr. Miho: I might wait until tomorrow. If your Honor please, in justice to the defendant—I have talked to Mr. Ahrens—we are of the opinion that it would be very helpful to the entire case if the jury and your Honor would take an inspection trip of the scene. It is not too far, if your Honor please.

The Court: All right. Suppose you and Mr. Hoddick see me in chambers right now and we will discuss it. [193]

Until 9 o'clock tomorrow morning.

(Thereupon, at 4:05 p.m., December 12, 1949, an adjournment was taken until December 13, 1949, at 9:00 a.m.)

December 13, 1949

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness, for further trial.

Mr. Miho: Ready for the defendant.

The Court: We are a little late starting this morning. Our apologies to anyone we have kept waiting, which includes the jury. Are the parties now ready to proceed?

Mr. Miho: Yes, your Honor.

Mr. Hoddick: Ready for the plaintiff, your Honor. I believe it is going to be necessary for Mr. Miho and myself to present argument to your Honor on the question we have been considering. I presume that should be done in the absence of the jury, if your Honor wants to consider that question at this time.

The Court: Very well. I will at this time excuse the jury and hear argument on a motion. So gentlemen, if you will step outside for a few minutes——

Mr. Hoddick: If your Honor please——

The Court: Just a minute. The record may reflect that the jury is now out of the court room and out of the hearing of that which transpires in the court room. The defendant is present and you, Mr. Miho, are about to present your motion for a mistrial.

(Argument by Counsel in the absence of the jury.) [195]

(Motion for mistrial, referred to on page 159 of the transcript, denied.)

(Exceptions taken.)

(Jury returns.)

Mr. Miho: May I note for the record, if your Honor please, that the defense excepts to your Honor's ruling on the motion for a mistrial for the reasons stated in the absence of the jury.

The Court: Yes. The exception being noted, the jury now being present, and the defendant also, the trial may proceed.

ALFRED A. SOUSA

resumed the stand and testified further as follows:

The Court: Mr. Sousa, you are the same Mr. Sousa who heretofore has testified in this case?

The Witness: I am, your Honor.

The Court: I remind you that you are still under oath. You may take the witness.

Mr. Hoddick: I believe the witness was on cross-examination.

The Court: Cross-examination, yes.

Cross-Examination

(Continued)

By Mr. Miho:

Q. Officer Sousa, after the raid was all over and the defendant had been subdued, do you remember any officers' [196] going into the defendant's yard and looking for the car key, the defendant's car key, to the Hudson car?

A. No, sir, I don't remember that.

(Testimony of Alfred A. Sousa.)

Q. You don't remember that?

A. No, sir.

Q. Do you remember who drove the car away, the car that was confiscated, the Hudson car?

A. I am not sure, but I think it was Officer Pestano.

Q. Pestano. But you don't remember anyone going around looking for the key to the car?

A. No, sir.

Q. On the ground? A. No, sir.

Q. By the way, have you talked about this case to anyone, discussed this case with anyone since the time of the raid? A. What?

Q. Have you discussed this case with anyone since the raid?

A. With those that haven't testified.

Q. Only with those that haven't testified?

A. Before—prior to the time I took the stand?

Q. Yes. A. Yes.

Q. Whom did you discuss it with, or you didn't? What [197] are you trying to say?

A. I am trying to say before I took the stand, and the boys who didn't take the stand, we talked the case over.

Q. But with those fellows who took the stand you didn't discuss the case? A. No, sir.

Q. At any time since the raid?

A. That's right, sir.

Q. You are with them all the time, aren't you?

A. Yes, sir.

(Testimony of Alfred A. Sousa.)

Q. You see them every day, practically?

A. Just about.

Q. But you didn't discuss the case with them?

A. No, sir.

Q. Didn't discuss the case with Mr. Wells either? A. No, sir.

Q. You didn't discuss the case with Mr. Hoddick? A. Beg pardon?

Q. You didn't discuss the case with Mr. Hoddick, the man sitting on the right of Mr. Wells?

A. I talked to Mr. Hoddick.

Q. Before the trial? A. Yes.

Q. But the other officers and Mr. Wells, you didn't discuss this case at all? [198]

A. I didn't discuss the case, no, sir.

Q. I want to call your attention to your statement again that you were standing around and all the other officers were standing around when the six capsules were seen. You told us that yesterday.

A. I was standing around.

Q. And did you also——

Mr. Miho: Withdraw the question.

Q. (By Mr. Miho): Was the defendant present, or not, at that time? A. Yes, sir.

Q. He was present? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Who was standing by him?

A. I don't recall.

Q. Was the defendant handcuffed?

A. I don't remember that, whether he was handcuffed at that time or not.

(Testimony of Alfred A. Sousa.)

Q. Was he still bleeding or had he taken care of his bleeding with a towel or something, and how was his face with relation to blood?

A. If I recall correctly, I think there was some blood still coming out of his lip. [199]

Q. Still coming out? A. Yes.

Q. How about the back of his head?

A. I don't remember that, whether the blood was coming out of the back of his head or not.

Q. And you say the defendant was standing?

A. Yes.

Q. So that when you came back from the house, making a call to the rest of the police officers to come, when you came back from Officer Abbey's house, you saw all of these officers standing around at a certain spot; is that what you are trying to tell us?

A. They were present out in the yard, yes.

Q. Close together?

A. Well, I don't know how close.

Q. Well, close enough to touch each other; is that right? Isn't that what you were telling us?

A. They weren't in a huddle. I know that.

Q. They were standing close enough, were they, so they could touch each other?

A. No, I don't think so.

Q. You don't think so? A. No, sir.

Q. Close enough so that they could talk to each other? A. Yes, sir. [200]

Q. And where was Mr. Wells at that time?

(Testimony of Alfred A. Sousa.)

A. I don't remember the exact spot, sir.

Q. But he was around there?

A. He was present, yes.

Q. I thought you told us yesterday somebody had to call Mr. Wells from some place.

A. That's right.

Q. Where was Mr. Wells?

A. I don't remember.

Q. Are you sure someone had to call Mr. Wells, or are you just guessing?

A. No, I heard someone call Mr. Wells.

Q. Who called Mr. Wells?

A. I don't remember.

Q. Mr. Wells was not around that group, was he?

A. He was close by.

Q. Close by, outside of the group?

A. Yes.

Q. What was Mr. Wells doing?

A. That I don't know, sir.

Q. What were the words used when someone called Mr. Wells?

A. I don't remember, sir.

Q. How do you know someone called Mr. Wells?

A. I heard them call Mr. Wells. [201]

Q. What is that?

A. I heard them call Mr. Wells.

Q. What words did he use?

A. I don't know the words they used.

Q. You just know that someone called Mr. Wells?

A. That's right, sir.

(Testimony of Alfred A. Sousa.)

Q. Did you see Mr. Wells come up to the group?

A. Come up to where, sir?

Q. Come up to the group, join the group, after he was called.

A. Yes, Mr. Wells came by.

Q. Then what happened?

A. The capsules were pointed out to him.

Q. By whom?

A. I don't know who pointed them out.

Q. You don't know by whom?

A. No, sir.

Q. Then what happened? Then what happened next?

A. The capsules were picked up.

Q. By whom?

A. I don't remember, sir.

Q. You don't know by whom?

A. No, sir.

Q. Someone pointed out the capsules; you are talking about the six capsules? [202]

A. I am talking about the six capsules, yes, sir.

Q. And you saw the capsules on the ground, you are talking about?

A. Yes, sir.

Q. And you were all standing around, six of you, excepting Mr. Wells; five of you were standing around?

A. We were all standing around. I don't know whether there were six or four or nine or how many were standing around.

Q. Anyway, someone called Mr. Wells and he came to where you were standing around?

A. Yes, sir.

Q. And the defendant was there?

A. The defendant was there, yes, sir.

Q. You don't know whether they handcuffed

(Testimony of Alfred A. Sousa.)

him or not? You don't know whether he was handcuffed or not?

A. I don't remember. I don't think he was at that time, but I can't make a positive statement.

Q. And then someone called Mr. Wells, you don't know who, and Mr. Wells came, from where you don't know? A. That's right, sir.

Q. And someone picked it up; you are sure of that, but you don't know who picked it up?

A. That's right, sir.

Q. Did you see a blackjack in anyone's hand?

A. Officer Abbey's.

Q. What did you see him do with that blackjack?

A. I didn't see him do anything with it.

Q. Well, when was it that you first saw Abbey with a blackjack?

A. I know he had it when he was in his house.

Q. You mean before the raid? A. Sure.

Q. Well, was he saying he was going to do anything with that blackjack or not?

A. No, he didn't.

Q. Who else had a blackjack at the house?

A. I don't know, sir.

Q. Well, didn't you see Officer Abbey with his blackjack at the scene of the scuffling, the struggling, as you say?

A. Yes, he had his blackjack with him.

Q. I am asking you what he was doing with the blackjack, if you saw it.

(Testimony of Alfred A. Sousa.)

A. I said I don't know, sir.

Q. You don't know? A. No, sir.

Q. You never saw him use it? A. No, sir.

Q. Did you see any other officer with a blackjack? [204] A. No, sir.

Q. Or anything similar to that?

A. No, sir.

Q. You didn't have any blackjack?

A. No, sir.

Q. Officer Sousa, can you tell us today—yesterday you weren't so sure—can you tell us today—You were about eight feet behind Mr. Wells as he came up to the defendant's car; do you remember that? Six to eight feet behind Mr. Wells?

A. That's right.

Q. As he came up to the defendant's car?

A. That's right.

Q. You were the first one behind Mr. Wells, too; that right? A. Captain Whitford and myself.

Q. But Whitford went to the right of the car?

A. That's right, sir.

Q. So far as anyone being behind Mr. Wells as he went up to the defendant's front part of the car, you were the only one behind Wells at that time; is that right? A. I was behind Mr. Wells.

Q. I am asking you now to tell us today whether when Mr. Wells first went up to the front left door of the defendant, whether you saw the defendant's hand on the door or any part of the door, or not.

(Testimony of Alfred A. Sousa.)

A. No, I don't remember that, sir.

Q. You don't remember that?

A. No, sir.

Q. But the door was open? A. Yes, sir.

Q. When Mr. Wells first went up to the defendant, or as he was just about to reach the defendant's position in the front of his car, the door was closed, wasn't it? A. Partially opened.

Q. Before that, it was closed?

A. When he was driving in, the door was closed.

Q. When he was driving in, just as he came to a stop, the door was closed, wasn't it?

A. I don't recall it that closely, sir.

Q. You don't recall? A. No, sir.

Q. How far was Mr. Wells from the car door when the door was opened, if you know?

A. Will you repeat that again, sir?

Q. How far was Mr. Wells from the left door at the time the door opened?

A. Well, he was not too far away.

Q. Not too far away? A. No, sir.

Q. About one foot, two feet? [206]

A. I imagine maybe a couple of feet.

Q. You imagine maybe a couple of feet, and that is about the time the car came to a stop?

A. No, the car was stopped already.

Q. Stopped already? A. Yes.

Q. You were in a direct line behind Mr. Wells at that point?

A. I don't remember whether I was in a direct line, sir.

(Testimony of Alfred A. Sousa.)

Q. But in a position to see him; right?

A. Yes, I could see him pretty clear.

Q. And in a position to see the door; right? Of the car?

A. Yes, sir.

Q. And you saw, the only part of the defendant's body that you were able to see at that time was part of his left hand as he pushed Mr. Wells, you indicated yesterday, like this (indicating)?

A. And his foot.

Q. And his foot. Were you one of those who searched the defendant's car?

A. Yes, I looked in the defendant's car.

Q. Who else helped you look into the defendant's car?

A. I don't remember, sir.

Q. You don't remember? [207]

A. No, sir.

Q. Did you find anything in the defendant's car at any time?

A. I didn't find anything there, sir.

Mr. Miho: That is all.

The Court: Redirect.

Redirect Examination

By Mr. Hoddick:

Q. When you stated, Mr. Sousa, that you saw the car, or the door of the defendant's car open, did you see it open from a closed position or was it already partly open when you first saw it?

A. It was partly——

Mr. Miho: If your Honor please, that is a very leading question.

(Testimony of Alfred A. Sousa.)

The Court: Sustained.

Q. (By Mr. Hoddick): Mr. Sousa, what was the original position of the door when you first noticed the door?

A. It was partly open when I first noticed it, sir.

Q. Was there any change in that position?

A. Yes, as the defendant came out. Next time when I noticed the door, it was widely open.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.) [208]

The Court: Next witness.

Mr. Hoddick: Mr. Pestano.

HARRY L. PESTANO,

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Harry L. Pestano.

The Court: Your age?

The Witness: Twenty-six.

The Court: Your residence?

The Witness: 523 North School Street.

The Court: Honolulu?

The Witness: Yes, Honolulu.

The Court: Your occupation?

The Witness: Police officer, Honolulu Police Department.

(Testimony of Harry L. Pestano.)

The Court: And your citizenship?

The Witness: United States of America.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Pestano, how long have you been with the Honolulu Police Department? [209]

A. It is one year—it is two years January 19.

Q. What division of the Police Department are you assigned to?

A. Right now I am in the patrol division.

Q. And to what division were you assigned during July of this year?

A. I was in the vice division.

Q. How long did you serve in the vice division?

A. Fourteen months.

Q. Do you know the defendant, Orestus Cavness?

A. Yes.

Q. Would you point him out for the Court and jury, please?

A. He is sitting right there, right next to Mr. Miho.

The Court: Well——

Mr. Hoddick: May the record show he identified the defendant.

The Court: There are two people sitting next to Mr. Miho. Which one is he?

(Testimony of Harry L. Pestano.)

The Witness: The one at Mr. Miho's left.

Q. (By Mr. Hoddick): You mean on the far end of the table? A. Yes.

The Court: All right.

Q. (By Mr. Hoddick): Do you know where the defendant [210] lives?

A. Yes. 1138 Leahi Avenue.

Q. Excuse me. I don't know if I got that address correctly. Do you know what address it is?

A. Leahi Avenue; 1138, I believe.

Q. Do you know who lives opposite Mr. Cavness? A. Yes, Officer Abbey.

Q. Did you have occasion to go to Mr. Cavness' house or premises during the month of July, 1949?

A. Yes, on July 19.

Q. And where were you immediately before going to Cavness' house?

A. I was at the fire station on Kapahulu Avenue.

Q. And what were you doing there?

A. I was waiting for orders prior to a raid that was to be conducted at 1138 Leahi Avenue.

Q. That is at the defendant's premises?

A. Yes.

Q. And did you receive such instructions?

A. Yes, I did.

Q. And you went to the defendant's premises?

A. Yes, after being called by Sergeant Sousa.

Q. Approximately what time?

A. About 5:50 to about 5:55 p.m.

(Testimony of Harry L. Pestano.)

Q. And what did you see when you got there?

A. When I got there, Captain Whitford was in the front of the car, in the premises, 1138. Cavness was handcuffed. Officer Abbey, Officer Shaffer, and Sergeant Sousa, with myself and Officer Marcotte and Officer Ferry, when we got there the party that had been at the raid before we had was preparing to enter the house.

Q. And Cavness was with them as they were going into the house? A. Yes.

Q. Do you remember what the condition of his hands was?

A. He was handcuffed in the back. Both hands were in the back of him, handcuffed.

Q. Did you see Mr. Wells when you got there?

A. Yes, he was there.

Q. Did you go into the house with them?

A. Yes, when we got there, Mr. Wells, Captain Whitford and the rest of the party prepared to go into the house, so we followed.

Q. And what took place after you all went into the house?

A. Nothing, to my knowledge. Just that I followed orders as to searching the house, the rooms.

Q. Did you see Mr. Wells serve a search warrant on Mr. Cavness in the house?

A. In the house, yes, I did.

Q. Did you see Mr. Wells at any time in the house [212] place the defendant under arrest?

A. Yes.

(Testimony of Harry L. Pestano.)

Q. Do you remember what the grounds for that arrest were?

A. For narcotics, as Mr. Wells put it. What I recollect was, the defendant Cavness was always on the move; he couldn't sit down one place, and Officer Marcotte——

Q. Just what the grounds were for placing Mr. Cavness under arrest in the house after you got in. You say possession of narcotics?

A. Yes, Mr. Wells told——

Mr. Miho: I object to that question. I think Counsel has had enough leeway. I don't like to interrupt, but he is putting the answers in question form to every witness.

The Court: Let's confine ourselves to what is before us presently. The question, as doctored, is leading. The objection, therefore, is sustained. The question, Mr. Witness, is: For what purpose, if you know, did Mr. Wells, in the house, arrest the defendant?

The Witness: Well, when I was in the room—I mean in the parlor there, I was told to watch Cavness with Officer Marcotte, and Cavness was always——

The Court: Wait a minute. Answer the question. For what cause, if you know, did Mr. Wells, in the house, [213] arrest the defendant?

The Witness: Mr. Wells told Cavness he was placed under arrest for narcotics.

Q. (By Mr. Hoddick): Now, Mr. Pestano,

(Testimony of Harry L. Pestano.)

when the officers—You participated in a search of the house? A. Yes, I did.

Q. And did you see anything that had been found by any of the other officers?

A. No, I did not.

Q. Prior to the time that you got there?

A. No.

Q. You didn't see anything that any of the other officers found?

A. No, I did not. I didn't see them when they found them, but after everything was laid on the table, I saw it, in the vice room.

Q. You didn't see it until you got to the vice room? A. Yes.

Q. In your search did you find anything?

A. Yes.

Q. And, if so, where?

A. Yes, I did, in the——

Mr. Miho: If your Honor please, I think that is objectionable in the light of your Honor's ruling during motion for suppression of evidence. The motion was denied, but [214] evidence as to suppression was restricted as to the things they were permitted to search and not to other objects.

The Court: Your general statement as to my ruling is substantially correct. Now the question is what?

Mr. Hoddick: The question now is whether this officer found anything in his search of the premises, and if so, what.

(Testimony of Harry L. Pestano.)

Q. (By Mr. Hoddick): Answer the first question first. Did you find anything in your search of the premises? A. Yes.

Mr. Miho: Just a moment, if your Honor please.

The Court: Wait a minute. We have got to start somewhere. Simply did he find anything, "yes" or "no."

Mr. Miho: But I believe under your Honor's ruling that he is restricted, and therefore if Counsel is offering through this witness, to try to introduce those matters that have been specifically restricted, it will be improper, is my point. I don't like to have the thing presented and have the Court instruct the jury to disregard it. It will be unfair.

The Court: I am sure Mr. Hoddick is aware of the Court's ruling. If he wilfully violates it, he will hear from me.

Mr. Hoddick: May it please the Court, it was my understanding that you ruled pursuant to the search warrant only the drug itself would be introduced in evidence, that [215] pursuant to the lawful arrest in the yard those items found in the yard closely connected with the scene of the arrest could be introduced into evidence, and, third, that it was suggested by myself that pursuant to a further arrest in the house that items found in the house might be introduced in evidence; and I understood that question was left open until we would reach it at this time.

Mr. Miho: That is not your Honor's ruling, if

(Testimony of Harry L. Pestano.)

your Honor please. The record speaks for itself.

The Court: I know what I ruled, and I am not going to review it now in the presence of the jury. But I don't know so far what this man was doing, whether he was functioning under the search warrant under Mr. Wells' direction or whether he was functioning under some other basis. All you have asked him is, Did he participate in the search and find something. Let's get a foundation here and find out what he was doing. I am going to sustain the objection simply to make Mr. Hoddick start all over again and get a fresh start on this.

Q. (By Mr. Hoddick): After you arrived at the premises, did you receive any further instructions? A. I did, yes.

Q. And what did you do as a result of those instructions?

A. I started looking for evidence concerning the case. [216]

Q. And who gave those instructions to you?

A. Captain Whitford.

Q. Now was this before or after Mr. Wells placed the defendant under arrest for the possession of narcotics in the house? A. After.

Q. After? A. Yes.

Q. Now, my question is, In the course of your search, did you find anything?

A. Yes, I did, an empty Vicks inhaler tube.

Mr. Miho: Just a moment. If Your Honor please, the foundation is still improper and the original ruling of the Court still holds, if your

(Testimony of Harry L. Pestano.)

Honor please. This is the first time I have seen a case in which the witness is permitted to state what some other witness present in court stated to him. That is the first time anything came up for arresting the defendant in the house for possession of narcotics. It has been admitted that he is no expert on narcotics.

The Court: Who?

Mr. Miho: Mr. Wells. This witness is trying to say Mr. Wells arrested the defendant for possession of narcotics in the house, if your Honor please.

The Court: I don't think you are following what is [217] being said. I didn't understand the witness to mean, when he said that, that the man arrested actually had narcotics then in his possession.

Mr. Miho: That is what Mr. Hoddick's question is, and his answer that Mr. Wells arrested the defendant in the house for the possession of narcotics.

The Court: Yes.

Mr. Hoddick: That is correct.

The Court: But I don't think it has the meaning that you attribute to it. I am going to excuse the jury and we will get this straightened out. Step outside again, please.

(Jury exit.)

The Court: The jury is now outside.

(Discussion of Court and Counsel.)

(Recess had.)

(Testimony of Harry L. Pestano.)

The Court: Note the presence of the jury and of the defendant.

Mr. Miho: Ready for the defendant, your Honor.

The Court: Ready to proceed?

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Officer Pestano, how many of you came to the scene from the fire station, if you recall? [218]

A. Three of us.

Q. Who?

A. Officer Marcotte, and Officer Ferry.

Q. Where was Officer Roberts?

A. Officer Roberts came by himself, I believe. After we came, Officer Roberts arrived.

Q. All three of you, Marcotte, Ferry and yourself—By the way, your name is spelled (spelling) P-e-s-t-a-n-o? Or (spelling) P-e-s-t-a-n-a?

A. (Spelling) P-e-s-t-a-n-o.

Q. (Spelling) N-o? A. Yes.

Q. The three arrived at the defendant's house in the same car? A. Yes, sir.

Q. And when you arrived, how many officers were proceeding into the house? All six? Or, May I ask you this question; it may be simpler. Were all the other officers, other than you three, were they all going into the house of the defendant? And Wells? A. Yes, sir.

(Testimony of Harry L. Pestano.)

Q. Now did they all go into the house, actually go into the house? Do you recall that?

A. I did. As to actually, they did.

Q. Did you follow them in? [219]

A. I went in about third or fourth person.

Q. But do you remember clearly that they all came into the living room at that time; is that right?

A. I couldn't say if all of them came in, but most of the officers that participated were in the living room.

Q. Do you recall specifically if Officer Abbey and Officer Shaffer, Sergeant Shaffer, were in the parlor that first times? A. Yes.

Q. They were? A. Yes.

Q. And you actually saw them; is that right?

A. Yes.

Q. That is why you know? A. Yes, sir.

Q. At that time, Mr. Pestano, so far as you can now recall, no one had found anything in the yard, is that right, at that time, when you first went into the house? A. Yes.

Q. And then after you had gone into the house with all the other officers, then someone went out, isn't that right, Officer Abbey and Officer Shaffer went out of the house? A. I couldn't say.

Q. But someone yelled from the outside that something was found; isn't that right? [220]

A. I couldn't say for anybody else because I didn't hear it.

(Testimony of Harry L. Pestano.)

Q. Do you recall anybody saying something was in the yard? A. No.

Q. You don't recall that? A. No, sir.

Q. Well, do you recall whether he went out into the yard later on to look for the key to the car?

A. No, sir.

Q. You don't recall that?

A. No, sir. I went out myself.

Q. You went out yourself?

A. In the back, facing the dog.

Q. A little German police dog, puppy?

A. I couldn't recall if it was a German police.

Q. It was a small dog, though?

A. It was not a small dog. It was quite big.

Q. Was it a dog or puppy? Don't you know the difference between a puppy and a grown dog?

A. No, I don't. It could have been still a puppy. I really don't know if it is a puppy.

Q. It wasn't a vicious dog, snapping at you, or anything like that, was it? A. No.

Q. Do you recall seeing where the defendant was [221] bleeding at any part of his face or head or not? A. Yes.

Q. And, Pestano, tell us where he was bleeding.

A. Well, he was bleeding on his lip and his head.

Q. The back of his head?

A. On top of it. It was dripping down on the back.

Q. Did you notice whether the skull was open or not? A. No, I didn't.

Q. Did you notice how long the cut was, or not?

(Testimony of Harry L. Pestano.)

A. No, I didn't.

Q. Do you remember his right eye, whether it was bruised or not?

A. I didn't notice. I just noticed that he was bleeding.

Q. What about his cheeks, right cheek?

A. No, I didn't notice.

Q. Of course, he is very dark; you may not have seen that. Do you know if any officers later on went to search for the car keys or not?

A. No, sir, I don't know.

The Court: Speak louder, please.

Q. (By Mr. Miho): Do you know who drove the defendant's car away from his yard?

A. Yes, sir, I did.

Q. You did? [222] A. Yes, sir.

Q. Who gave you the key to the car?

A. Mr. Wells.

Q. This man here who sits on the left of Mr. Hoddick? A. Yes, sir.

Q. With his hand over his mouth?

A. Yes, sir.

Q. Do you know where Mr. Wells got the key to the car? A. No, sir.

Q. You don't? A. No, sir.

Q. He told you to take the car down to the police station? A. Yes, sir.

Q. That was the defendant's car, the Hudson car in the driveway?

A. It was a Hudson car. I really don't know if it is his own car or not.

(Testimony of Harry L. Pestano.)

Q. And that was after everything was all over; isn't that right? A. Yes, sir.

Q. And that was after defendant had already been taken some place by some other officers? When you drove the car away, defendant was not present; is that right? [223]

A. He was present up until the time I started the car, because we all left at the same time.

Q. He was present up until that time?

A. Yes.

Q. And when you first came up there to join the other boys going into the house, defendant was handcuffed on his back like this (indicating) as I am demonstrating; is that right? A. Yes, sir.

Q. And was the defendant later on released from his handcuffs in the house? A. Yes.

Q. And then he was permitted to wash himself; is that right?

A. Yes. I followed him to the bathroom; and Officer Marcotte.

Q. Up to that time no one mentioned anything about finding anything; isn't that right? Up to that time?

A. To the time prior to going into the lavatory?

Q. No. I will reframe that. Up to the time the defendant was released from his handcuffs to go in and wash himself, up to that point—this is in the house. A. Yes.

Q. Up to that time no one had found anything, so far as you know? [224]

(Testimony of Harry L. Pestano.)

A. Well, I was told that something had been found.

Q. At that point? A. Yes, before.

Q. He was released?

A. Before he went to the lavatory, he was released already.

Q. Had the defendant gone out of the house?

A. He was out when I came there, but after that I didn't.

Q. After he was brought into the house and you proceeded with him, about the fourth man behind the defendant, after he came into the house that time, he was never out of the house; isn't that right?

A. I really don't know because I was searching the rooms.

Q. Did I misunderstand you? Weren't you told to watch the defendant with someone else?

A. Yes, with Marcotte. After that I was told——

Q. To stay with the defendant?

A. No, Officer Marcotte was told that. I was told to accompany the rest of the officers in searching the rooms.

Q. Before you went up to the defendant's house—let's go back to the vice squad. I presume you all had a meeting at the vice squad, Captain Whitford's office or some place in the police station.

A. Yes.

Q. And all nine or ten of you were present with Mr. Wells, is that right, at that time?

(Testimony of Harry L. Pestano.)

A. No, we had instructions, we were on the road at the time, and we were supposed to be at a certain point. At the time the plan was made prior to the arrest of the defendant we didn't know anything.

Q. Well, the instructions came by telephone?

A. Radio.

Q. Radio. And what was said in that instruction?

A. We were to be at a certain point at a certain time.

Q. To raid his place?

A. No. We didn't know whose place we were to raid. We were supposed to be at that certain point and wait for further instructions.

Q. A while ago you said you were waiting to raid the defendant's home. Didn't I understand you to say you were waiting to raid the defendant's home? Didn't you say that to Mr. Hoddick?

A. Yes, I did.

Q. And now you are saying——

A. Prior to that we didn't know anything.

Q. When did the idea of a raid come into your mind?

A. Well, it come natural after how many raids we have been at. When we were sent to a certain point, we knew there [226] was something coming up. I knew there was going to be a raid. As to where it was, we didn't know.

Q. But you knew you were going to raid someone's place; isn't that right? A. Yes.

(Testimony of Harry L. Pestano.)

Q. And the idea of going to search someone's place never entered into your mind; isn't that right? A. Not at that time.

Q. The only idea you had in mind was that you were going on a raid some place; isn't that right?

A. Yes.

Q. Mr. Pestano, you and the other officers searched for some time after the defendant was brought into the house, handcuffed and brought into the house; isn't that right? A. Yes.

Q. It took a long time; approximately two hours; is that right? A. Yes, about that.

Q. When you first went up there, it was still light, wasn't it? A. Yes, sir.

Q. But when you left the place, it was just after darkness; isn't that right?

A. Just beginning to——

The Court: Speak up. [227]

The Witness: Just beginning to come dark.

Q. (By Mr. Miho): Did you see someone with a blackjack in his hand at any time?

A. No, I did not.

Q. Did you ask anyone how the defendant received his injuries at any time?

A. No, I did not.

Q. Do you remember anyone saying how the defendant received his injuries? A. Yes.

Q. What did they say, or who said what?

A. I was told that he was hit on the hand with a blackjack. As to how he had a cut on the head,

(Testimony of Harry L. Pestano.)

I was told that he fell next to the car and bumped his head.

Q. Bumped his head on the car. Do you remember who said that to you or to someone else?

A. Yes, the officers did.

Q. Officer Shaffer, wasn't it?

A. Well, not particular; Sergeant Sousa.

Q. Sousa said that, too? A. Yes.

Q. Did Abbey say that, too? A. Abbey?

Q. Yes, Abbey. A. Yes. [228]

Q. He said that, too. In other words, they all said in your hearing, in your presence, that the defendant received his cut because he fell on the car bumper?

A. That is one of the reasons how he got it, if he had it from the car bumper. They didn't say he had it directly from the car bumper.

Q. Did anyone say how he received the injuries on his face? A. No.

Q. You didn't hear that? A. No.

Q. You didn't inquire either?

A. No, sir, I didn't see any, I didn't notice any.

Q. Of course, you never took part in any of the subduing? A. No, sir.

Q. That was all over? A. Yes, sir.

Q. Do you remember seeing blood on the ground, Officer Pestano? A. No, I did not.

Q. You did not? A. No.

Q. You saw the defendant's shirt was bloody?

A. Yes, I did. [229]

(Testimony of Harry L. Pestano.)

Q. Especially in the front; isn't that right?

A. I don't recall it was in the front, but I know he was bleeding from the back.

Q. And do you remember seeing Officer Paul Shaffer's shirt that he had on full of blood in the front?

A. No, I didn't notice.

Q. You didn't notice that?

A. No, sir.

Q. Did you notice any other officers with blood on their shirt or hand?

A. I didn't notice. I was right next to the defendant.

Q. You went back to the vice squad; were you present when Agent Wells came into the vice squad, captain's office?

A. Yes, when I handed him the empty Vicks inhaler tube.

Q. Do you remember if Captain Whitford handed anything over to him?

A. No, I don't.

Q. You were present, though?

A. Well, as officers, we don't mingle.

Q. You don't mingle?

A. Captain's office is captain's office, and we are out unless called in.

Q. Your regulation is: Captain's office is more or less, sort of a safe, forbidden place? [230]

A. That's right.

Q. And you officers, except the Captain himself, unless you have permission, you don't go in there?

(Testimony of Harry L. Pestano.)

A. Yes.

Q. So in the Captain's office, so far as you know, there were only Captain Whitford and Agent Wells?

A. Some of the boys were in.

Q. Who?

A. Officer Shaffer and Sergeant Sousa, they were called in. When I got there I was called in. Also the rest of the officers were in there.

Q. You were called in one by one?

A. Yes, sir.

Q. You didn't all go in there from the beginning?

A. No, we did not. I was outside I know, but as to who was in the room at the time before that, I don't know.

Q. But what probably happened, from your recollection, is this, isn't it: that Captain Whitford and Mr. Wells went into the Captain's room first?

A. Yes, sir.

Q. And Captain Whitford would call certain officers and they would go in?

Mr. Hoddick: I object. There is no foundation laid to show this defendant would know what took place.

The Court: Sustained. [231]

Mr. Hoddick: Furthermore, any questions dealing with the vice squad I will object to on the grounds it is improper cross-examination. He was not queried about anything after this raid on direct examination.

(Testimony of Harry L. Pestano.)

The Court: Overruled on that ground, but the first ground is sustained. We are not interested in what probably happened, but what happened, if he knows.

Q. (By Mr. Miho): Isn't that what happened? Captain Whitford and Mr. Wells went into the Captain's room first and Captain Whitford would call some other officer into his room, one by one; isn't that what actually happened?

A. Yes. Sergeant Sousa was already there.

Q. Sousa was also there with Whitford and Wells first? A. Yes, I believe he was.

Q. And then the others would be called in?

A. Yes.

Q. Did you ever run into, in your fourteen months there, any woman by the name of Jerry Wilson?

Mr. Hoddick: Objection.

The Court: Sustained.

Mr. Miho: No further questions.

The Court: Redirect Examination.

Mr. Miho: Save an exception.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.) [232]

The Court: Call the next witness.

Mr. Hoddick: May it please the Court, at this time the Government would like to rest its case.

The Court: Very well.

Mr. Ahrens: At this time, your Honor, defense moves for a judgment of acquittal on the ground the Government has failed to introduce evidence sufficient to sustain a conviction, first, in that the Government has failed to prove knowledge on the part of the defendant that the cocaine was not in or from the original stamped package; secondly, that the Government has failed to prove directly the absence of appropriate tax stamps; and, thirdly, if they have proved the absence of those stamps, that they have failed to prove that the cocaine was not from an original stamped container.

The Court: Very well, do you wish to be heard in argument upon that motion?

Mr. Ahrens: Yes, your Honor.

The Court: All right, but not now. Do you resist the motion?

Mr. Hoddick: Yes, your Honor.

The Court: All right, I will excuse the jury until 2 o'clock this afternoon.

Mr. Miho: Perhaps, if your Honor please, an inspection of the premises could be arranged about 1:30 to save time. [233]

The Court: I have a matter at 1:30 I have to attend to. How far away is this place where you want us to take a view?

Mr. Miho: Not far. I think it is about a ten- or fifteen-minute drive, as I recall. The jury could go by themselves while we argued—I mean, accompanied by the Marshal.

The Court: I appreciate your liberality, but I think the best thing is to have the jury report at 2

and have the Marshal make arrangements to have transportation available, and at your request we will go out and take a view of the premises. It may develop by 2 o'clock there may be no need of going. But let's have the jury report at 2 and we will go on from there.

So at this time, Gentlemen of the Jury, I will excuse you until 2 o'clock, and in the meantime I will retain Counsel and hear them upon the motion. At 2 o'clock we will find out where we go from there.

(Exit jury.)

The Court: The jury is now out of the court room.

(Argument by Counsel.)

(Thereupon, a recess was taken at 12.00 noon until 2 p.m. of the same day.) [234]

Afternoon Session

2:00 p.m.

The Court: Gentlemen, the attorneys are out at the place where we are going to take a view, so we will adjourn to it for the purpose of taking a view. But before we do, I want to remind you that this is a view only; it is not evidence. We are simply going to go and see the premises that have been described in the evidence so you can better understand the evidence. There will be no talking except as the attorneys ask me to call your attention to certain physical objects, so you just listen and observe what may be pointed out to you, but do not

discuss the case with anyone. So we will all go out through the door and go into the bus.

(View of the premises taken.)

The Court: Note the presence of the jury and of the defendant and let the record show that between the hours of two and three this afternoon we have been on a view of the premises, in accordance with the request of the defendant. Having returned therefrom, with respect to the pending motion, before I rule, is there something you want to say, Mr. Ahrens?

Mr. Ahrens: Did you want further argument on the motion or did you wish to rule out of the presence of the jury or in their presence?

The Court: I think I will not need any further argument. The motion is denied. You may have an exception.

Mr. Ahrens: We note an exception for the record. [235]

The Court: Mr. Miho, will you come here just a moment, please.

Mr. Miho: Yes, sir.

(Confer.)

The Court: Very well, the Government having rested, does the defense at this time wish to make an opening statement?

Mr. Miho: No, if your Honor please. I would like to reserve that until the case is over.

The Court: You can't reserve an opening statement any longer. You mean whatever you have to

say you will incorporate in your final argument, I take it is what you mean.

Mr. Miho: Yes, in my final argument.

The Court: So that at this time you may call your first witness.

Mr. Miho: Mr. Cavness, will you take the stand.'

ORESTUS CAVNESS

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Before we proceed, I again wish to remind the jury that the view of the premises in question which we took was not evidence but simply a view taken to better enable you gentlemen to understand the evidence which has been and will be adduced here upon the trial. [236]

All right, Mr. Witness, your name is?

The Witness: Orestus Cavness.

The Court: And your age is?

The Witness: Twenty-five.

The Court: And your residence is Honolulu?

The Witness: Yes.

The Court: And your occupation is that of?

The Witness: Barber.

The Court: And you are a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Take the witness.

(Testimony of Orestus Cavness.)

Direct Examination

By Mr. Miho:

Q. Where were you born, Orestus?

A. When?

Q. Where? A. Texas.

Q. And are your parents still living?

A. My mother is still living.

Q. She is on the Mainland? A. Yes.

Q. Is she dependent upon you in any way?

A. Partially.

Q. Do you have a father living?

A. My father is deceased.

Q. When you were how old? A. Eight.

Q. Did you go to school?

A. High school; elementary and high school.

Mr. Miho: Speak loud enough and clear enough so that you can be heard.

The Witness: Three and a half years in high school.

Q. (By Mr. Miho): Two and a half years?

A. Three and a half.

Q. Three and a half years in high school?

A. Yes.

Q. When was it that you got through with your school? A. '43, first of '43.

Q. And after you got through with your school, what did you do next?

A. I started working for defense.

Q. Started working what?

A. Defense.

(Testimony of Orestus Cavness.)

Q. Defense work? A. Yes.

Q. Where did you first work as a defense worker? A. Galveston. [238]

Q. How old were you then?

A. Seventeen, I think.

Q. And where did you work after Galveston?

A. Beg pardon?

Q. Where did you work after Galveston?

A. Dayton, Ohio.

Q. Still in defense work? A. Yes.

Q. And from Dayton where did you go?

A. Los Angeles.

Q. What did you do in Los Angeles?

A. I started working in defense.

Q. And then what?

A. Then in the meantime I was working in defense, I was working swing shift, so I was going to barber school part time.

Q. Will you speak clear enough—

A. I said I was going to barber school during the time I was working in defense, in the morning. See, I was working swing shift and so after a period of about a year I finished barber college and obtained a license to practice as a barber in the state of California. So the latter part of '44, I think it was, I started practicing as a barber.

Q. And are you still a licensed barber in the state of California? [239] A. Yes.

Q. And how long were you a barber in California? A. About three and a half years.

Q. Three and a half years? A. Yes.

(Testimony of Orestus Cavness.)

Q. In other words, you went to barber college during the same time you were working swing shift in the defense plant? A. Yes.

Q. And after your three and a half years as a barber in California, where did you go?

A. Came to Honolulu.

Q. Came to Honolulu? A. Yes.

Q. And when did you come to Honolulu?

A. In '47.

Q. When you came to Honolulu, you established a barber shop in Honolulu, I understand.

A. Yes.

Q. And you still operate a barber shop?

A. Yes.

Q. And how many people are with you, working for you in this barber shop?

A. Two besides myself.

Q. And the barber shop is your only source of income? [240] A. Yes.

Q. Are you a licensed barber in the Territory of Hawaii? A. Yes, I am.

Q. Are you a member—By the way, are you married or single? A. Single.

Q. Ever been married? A. No.

Q. You say this barber shop is still operated; is that correct? A. Yes.

Q. And are you a member of any fraternal organization or organizations? A. Elks.

Q. What? A. Elks.

Q. What do you mean? A. Elks.

(Testimony of Orestus Cavness.)

Q. Oh, the Elks? A. Yes.

Q. Locally? A. Yes.

Q. Are you a member in good standing of the Elks organization? A. Yes, I am. [242]

Q. Any other organizations?

A. Not as I can remember right now.

Q. You know who Mr. Wells is, do you not?

A. Yes.

Q. He is the man who is sitting at this trial on the left of Mr. Hoddick, the Government prosecutor? A. Yes.

Q. You had some pilikia with him July 19 of this year, is that correct? A. Yes.

Q. Now, prior to that date——

Mr. Miho: Withdraw the question.

Q. (By Mr. Miho): On the day in question when you saw Mr. Wells, that is, July 19, did you recognize him as Mr. Wells? A. No.

Q. Subsequent to that raid on July 19, do you recall whether you had seen Mr. Wells before in your life or not? A. On one occasion I had.

Q. And what was that occasion?

A. We were having a birthday party with a resident of Waikiki, and since that time—I mean, he was identified to me as the same person that I saw out there.

Q. Something happened at that birthday party; is that [242] right? A. Yes.

Q. Whom were you supposed to meet at the birthday party?

(Testimony of Orestus Cavness.)

A. Joe Louis was passing through, so a friend of mine informed me that we was supposed to be present, so we decided to go out there, and it was a birthday party.

Q. And that party was raided; is that right?

A. Yes.

Q. And someone told you later on that Wells was in that raiding party; is that right?

A. They pointed him out, yes, afterward.

Q. But on July 19 when you saw Mr. Wells, did you know who he was?

A. No, because that night when I saw him at this party, he was wearing a hat, and seeing a person twice it is kind of hard, I mean it would make a big difference with a man wearing a hat.

Q. How did Mr. Wells look to you on July 19?

A. He appeared to be drunk, under the influence of alcohol.

Q. You have seen drunken people before in your life?

A. Yes.

Q. Now you drove up in your car, the Hudson car?

A. Yes. [243]

Q. On that day about 5:30 or thereabouts; is that right?

A. Yes.

Q. How soon after you stopped your car did you happen to see Mr. Wells?

A. Immediately.

Q. Immediately after you stopped your car?

A. Yes.

Q. Do you remember what you did just about that time?

(Testimony of Orestus Cavness.)

A. Well, I was turning the switch off and getting out of the car and opening the door at the same time.

Q. And that is when you saw Mr. Wells?

A. Yes, when I looked around, he had his head in the window.

Q. Take your time and tell us in detail what happened at that time.

A. So when I turned my head to get out of the car, I looked and he had his head in the window of the car.

Q. What happened next.

A. As I proceeded to get out, he grabbed my left arm.

Q. Do you know whether you had anything in your right hand at that time or not?

A. I am not sure. I could have had my car key because that is what I was doing, pulling the key out of the switch when he approached. [244]

Q. Do you know whether, after the whole struggle and everything was over, whether anyone asked you for the car key or not? A. Yes.

Q. Who asked you for the car key?

A. Mr. Wells. Mr. Wells asked for the car key.

Q. Did you have the car key on your person?

A. No, I didn't.

Q. Do you know whether they found the car key at any place later on?

A. They went outside and searched for the car

(Testimony of Orestus Cavness.)

key and eventually they drove it off, so I gather they did find it someplace.

Mr. Hoddick: I move that that be stricken unless it be shown the witness saw them find the car key outside. He says eventually they found it.

Mr. Miho: I don't mind that it be stricken.

The Court: It may go out.

Q. (By Mr. Miho:) Anyway, you didn't have the car key on your person when they asked you for it? A. No.

Q. But you were present when the car was driven out of the yard by someone else? Were you present? A. No, I was not.

Q. When you came back from the police station, was your Hudson car home?

A. Gone.

Q. Now, did you at that time, or at any later time, push or hit Mr. Wells? A. No.

Q. Do you know whether the door touched Mr. Wells or hit him as you tried to get out of the car or not? A. That I couldn't say.

Q. Did you get out of the car?

A. Yes, I did.

Q. And you say that is when Mr. Wells grabbed your left hand or arm?

A. Yes.

Q. Tell us what happened next.

A. Then as I stood up, why someone grabbed me from the other side, right arm.

Q. Grabbed what? A. My arm.

(Testimony of Orestus Cavness.)

Q. Then what happened?

A. A few seconds somebody called me a name.

Q. What kind of a name?

A. Called me "black son-of-a-bitch." Then a few seconds after that I fell down, something hit me from behind, I fell down, and I don't remember exactly what happened after that.

Q. What kind of a blow was it that you felt on the back of your head?

A. It felt like a blackjack blow, something similar, something hard.

Q. Did you lose consciousness?

A. Yes, I did.

Q. And everything that happened later on was a hazy blank to you? In other words, did you remember everything else that happened after that?

A. No, I can't, not distinctly.

Q. What was the most—What is it that you remember most clearly after being hit, the next thing after being hit?

A. Most clearly I remember the fact that we were going into the house.

Q. And that you had been handcuffed already?

A. Yes.

Q. And who took you into the house, if you remember?

A. Mr. Wells and two or three other officers. I don't remember exactly.

Q. What happened when you got into the house?

A. He told me to sit down and get myself to-

(Testimony of Orestus Cavness.)

gether. Mr. Wells. And then he suggested to Mr. Marcotte or one of the officers to release the handcuffs so I could clean myself up. And after I cleaned myself up, he told me to relax so he could serve a search warrant, so they could proceed on their duties. So when the officer served a search warrant, I mean I was hazy or something, so I told them, I refused to read it; I guess I didn't feel like reading it at the time. I told him "never mind." He asked me whether I cared to read it. I told him "no."

Q. He asked you whether you cared to read it and you told him "no"?

A. Yes. So then I went back into the bathroom again and they gave me a first aid treatment.

Q. Do you remember who went with you to the bathroom? A. Marcotte and Harry.

Q. Who?

A. Harry, the last guy that testified, I forget his last name.

The Court: Pestano?

The Witness: Pestano.

Q. (By Mr. Miho:) Was Shaffer with you, too?

A. He was in there, wasn't with me, but he was in the bathroom at the time.

Q. Did anyone say anything to you in the bathroom?

A. Shaffer made a remark that I must have fallen on the bumper of the car.

(Testimony of Orestus Cavness.)

Q. Must have fallen on the bumper of the car?

A. Yes.

Q. And received your injuries on the back of the head? A. Yes. [248]

Q. And did Shaffer go with you, and Marcotte, to the emergency hospital? A. Yes.

Q. And did Shaffer say anything on the way down to the emergency hospital?

A. No, I don't remember him saying anything.

Q. Now, after you were handcuffed and taken into the house, were you ever taken out of the house again? A. No.

Q. Were you ever taken out of the house when any officer saw something on the ground, or picked up anything on the ground? A. No.

Q. Were you ever confronted with anything that any officer found on the ground, or any place?

A. No, I was not. They asked me questions after I got to the vice squad, but I never seen any.

Q. They asked you questions at the vice squad, but you never saw anything?

A. I never saw anything.

Q. Did you see anything in Agent Wells' left hand when he first came to you?

A. In the yard?

Q. Yes.

A. I saw something in there. [240]

Q. Could you tell what it was he had in his left hand?

A. I couldn't identify what it was.

Q. Could you see his right hand at all?

(Testimony of Orestus Cavness.)

A. No, I couldn't.

Q. Did Wells ever say anything to you as to who he was or what he was there for, or anything like that, at that time?

A. Not at that time.

Q. He told you later in the house?

A. Yes.

Q. All that which you described which occurred soon after you stopped your car happened in how much of an interval of time?

A. I don't know the exact amount of time.

Q. Did it happen immediately, more or less altogether at one time, or at a long interval of time?

A. Happened immediately.

Q. Immediately. Now, did you have occasion to look at yourself in the mirror, or anything, after you went into the house?

A. In the bathroom.

Q. Bathroom? A. Yes.

Q. And did you see any injuries on your face?

A. Several injuries.

Q. Will you describe them to us. [250]

A. My lip was swollen and cut on the inside and outside, a bruise here (indicating), a bruise here (indicating), and my head behind.

Q. What was wrong with your head?

A. At the hospital they said the scalp was split-ten.

Q. And what did the doctor at the emergency hospital do to that scalp wound?

(Testimony of Orestus Cavness.)

A. Put two clamps in and shaved the hair around it.

Q. Were you able to eat—Before that had you had any injuries like that on your face and eyes, your cheek or your lips or your head, before you met Mr. Wells that day? A. No, I hadn't.

Q. Were you able to eat normally after this injury you received on your lips? A. No.

Q. How long did that continue, approximately?

A. About eight or ten days.

Q. You had difficulty in talking also; isn't that right? A. Yes.

Q. You didn't see anyone use a blackjack on you, yourself; is that right?

A. I don't remember seeing anyone. It was from behind and I didn't see it. I went face down.

Q. Have you ever been convicted of any kind of a felony [251] in your life up to now?

Mr. Hoddick: One second before you answer that, Mr. Cavness. I would like it understood as to whether Mr. Miho is endeavoring to put the witness' good character in issue or not. It seems to me that question is directed to that point.

The Court: You are asking him a question, not me.

Mr. Hoddick: I object to the question unless it is stipulated that defense Counsel is putting the witness' good character in issue.

The Court: You can exact no condition to his questions. Overruled. Do you wish to ask the question?

(Testimony of Orestus Cavness.)

Mr. Miho: Yes.

The Court: Read the question.

(Question read.)

Q. Answer the question.

A. No, I haven't.

Q. Do you know if you had anything in your left or right hand at any time at the raid?

A. I know I didn't have anything in my left hand at the time I was getting out of the car, but as I said before, I could have had the car key in my right hand, but I am positive I didn't have anything in my left hand.

Q. Did you have anything like the Vicks inhaler that they are talking about here in your left hand or right hand [252] that day?

A. No, I didn't.

Q. You said you are not sure whether you had a car key in your right hand or not?

A. I am not sure.

Q. Now, when you got out of your car, when Mr. Wells came up, did he open the door of that car or did you open the door to that car?

A. Well, I had cracked the door handle the same time I was turning the switch off myself.

Q. You opened the door yourself?

A. Yes.

Q. Mr. Wells didn't open the door, or any of the police officers; is that right? A. No.

(Testimony of Orestus Cavness.)

Q. Can you tell us whether the door, any part of the door, touched Mr. Wells or not?

A. That I am not sure.

Q. Did you see Mr. Wells at any time stagger behind or lose his balance? A. No.

Q. Did you hit anyone that day, Orestus?

A. No, I didn't.

Q. Do you remember how long it was that the officers searched your house and the yard, as you stated, after this [253] scuffle was all over?

A. They must have searched for about an hour and a half at least.

Q. At least an hour and a half? A. Yes.

Q. And then after they got through with their search, you were taken to the emergency hospital?

A. Yes.

Mr. Miho: Your witness, Mr. Hoddick.

The Court: Cross-examination.

Cross-Examination

By Mr. Hoddick:

Q. Where is your barber shop in Honolulu located, Mr. Cavness? A. 1164 Smith Street.

Q. And who are the two other barbers who work for you there? A. William Purify.

Q. And who else?

A. Willie James Calvin.

Q. And you cut hair there yourself?

A. Yes, I do.

Q. About how much time a day do you spend down there working?

(Testimony of Orestus Cavness.)

A. Three or four hours, according to the business. [254] I usually work at night most of the time.

Q. You mean after supper?

A. At night after maybe six o'clock.

Q. And the income from that barber shop is your only source of income? A. Yes.

Q. Approximately what is your gross income during the year from the barber shop?

Mr. Miho: Just a moment, if your Honor please. I venture to say that is completely immaterial, incompetent, and irrelevant. I don't see the materiality of how much he makes, whether a thousand or two thousand dollars a month.

Mr. Hoddick: The defense counsel opened up the subject of the barber shop and the fact that it was his only source of income. I would like to probe into that with reference to establishing the credibility or discredibility of the witness.

The Court: For what purpose?

Mr. Hoddick: The Government has — I think probably I should make whatever offer I am going to make out of the hearing of the jury, your Honor, out of fairness to the defendant.

Mr. Miho: He can rebut any testimony he wants to later on, if your Honor please, if it comes within the exception to collateral issue. [255]

The Court: This is cross-examination. You did open up the barber shop proposition. I will allow him to inquire into it, but I don't quite see what he is driving at at this moment.

(Testimony of Orestus Cavness.)

Mr. Miho: As to how much he makes, if your Honor please——

The Court: Unless it is in some way tied into this case it is irrelevant.

Mr. Hoddick: Your Honor——

The Court: You may proceed if you can connect it up. Otherwise, I will stop you.

Mr. Miho: Save an exception at this time.

The Court: Yes.

Q. (By Mr. Hoddick): Now you have to file— You file tax returns from the income earned from that barber shop? A. Yes.

Q. And how often do you file your returns with the Territory?

A. Supposed to file every quarter.

Q. Every quarter. Do you remember during the first two quarters of 1949 how much money you earned or how much gross income your barber shop earned?

Mr. Miho: Just a moment. It is still the same question stated in a different way, if your Honor please. As to his gross income, it is a matter of another criminal [256] procedure, if that is what he is trying to lay a foundation for. He is not being tried for any income tax evasion here.

The Court: That is correct. Gentlemen of the Jury, will you step out until I find out what this is all about.

(Exit jury.)

(Testimony of Orestus Cavness.)

The Court: The jury is now out of the court room.

(Discussion by Court and Counsel.)

(Objection overruled and exception noted.)

The Court: The jury is now present as is the defendant. You may proceed.

Mr. Hoddick: Will you read the last question to the defendant, please.

(Question read.)

Mr. Hoddick: Let me withdraw that question and reframe it.

Q. (By Mr. Hoddick): During the first two quarters of 1949 what was the gross income of your barber shop? A. Two quarters?

Q. If you remember.

A. On an average about \$600 per month, maybe a little better.

Q. And what were your expenses?

A. Maybe \$225.

Q. \$225 a month? [257] A. Yes.

Q. Then you made a net profit each month of \$375? A. Approximately.

Q. Now was it your custom, Mr. Cavness, to carry large sums of money around on you?

Mr. Miho: Objection, if your Honor please. There is nothing in the direct as to any large sums of money being carried by the defendant.

Mr. Hoddick: I will tie this in. It fits in.

Mr. Miho: I know there has been a lot——

(Testimony of Orestus Cavness.)

The Court: One at a time.

Mr. Hoddick: I say, I will tie this in. It fits in with the same subject.

Mr. Miho: Well, if you say you are going to tie it up, I would like to reserve the point that if it is not tied up, it be stricken, though it is harmful even though stricken so far as the defense is concerned.

Mr. Hoddick: I will withdraw that question.

Q. (By Mr. Hoddick): Since the barber shop was your sole source of income, was all money which you had in your possession at any time during 1949 money which you had earned from the barber shop?

Mr. Miho: Just a minute, if your Honor please, that is absolutely incompetent, irrelevant, and immaterial to the issue at stake here. I don't see the materiality of [258] this.

The Court: I can't see it as it is presently framed. I am going to sustain the objection unless you can clarify it to a greater extent. Was all money that he had in his possession derived from the barber shop?

Mr. Hoddick: That is right; money which he carried around in his pocket, was that money which came from the barber shop.

The Court: Well, without a different basis for proceeding along that line, I can't see it at the moment.

Q. (By Mr. Hoddick): You said that you saw Wells once before at a birthday party at a residence in Waikiki, except that he had a hat on?

A. Yes.

(Testimony of Orestus Cavness.)

Q. And Joe Louis was supposed to be at that birthday party?

A. Supposed to be a guest there.

Q. Did Joe Louis come?

A. He didn't show up. He only had a short lay-over; he was passing through when he was coming back from the Philippine Islands.

The Court: Joe Louis?

Mr. Hoddick: That's right.

Q. (By Mr. Hoddick): And whose birthday was it? A. Lillian Jones. [259]

Q. And is Lillian Jones a friend of yours?

A. Yes.

Q. And what day is her birthday?

Mr. Miho: Oh, your Honor, that is going very far afield, as to what day the birthday party was. I don't like to keep objecting.

The Court: Of what significance is that? Do you always celebrate your birthday on the right day?

Mr. Hoddick: All I am doing is further probing into this witness in connection with statements which he made on direct examination. I think a reasonable amount of probing is in order. Certainly, he went to this birthday party, he may not recall the exact date, he can tell me so.

Mr. Miho: I will withdraw the objection, if your Honor please, and let Counsel go into it.

The Court: Go ahead. Read the question.

(Question read.)

(Testimony of Orestus Cavness.)

A. I don't remember the exact date.

Q. Do you know approximately?

The Court: What did you say last?

The Witness: I said I don't remember the exact date.

The Court: Speak up loud so we can hear you.

Q. (By Mr. Hoddick): Do you know approximately how long before July 19 it was? One month? Two months? [260]

A. If I am not mistaken, I think it was May.

Q. Sometime in May. And how long was Mr. Wells at this birthday party?

A. That I don't know.

Q. Was he there when you got there?

A. I don't know.

Q. Did you see him come in?

A. No, I didn't.

Q. Did you notice any police officers there while Mr. Wells was there?

A. I noticed one guy presented himself as a police officer.

Q. And do you know who that was?

A. Mr. Anderson I think his name was.

Q. Was he in uniform? A. No.

Q. Was there anybody there in police uniform?

A. I don't think so.

Q. How many people were at this party?

A. I don't know.

Q. Did you know anybody else there besides Lillian Jones?

(Testimony of Orestus Cavness.)

Mr. Miho: Oh, if your Honor please——

A. Yes.

Mr. Miho: Just a moment. What if there were 200 [261] people there or 50 people, what materiality is there for him to say who was there and who was not there? Does that establish his credibility in any way, if your Honor please? There has to be a stop somewhere in cross-examination as to what is material and what isn't. We can't spend all night and all day here.

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: Granted.

Mr. Hoddick: Repeat the question, please.

(Question read.)

A. Yes, I did.

Q. (By Mr. Hoddick): And who else?

A. I don't remember exactly.

Mr. Miho: Just a moment, Mr. Cavness. If your Honor please, rather than spend the time arguing on any motion for other things that may come, I believe I know what Mr. Hoddick is trying to do and I believe we should have a conference at the desk here as to whether that is his purpose or not before any harm is done.

The Court: All right. Counsel may approach the desk.

(Court and Counsel confer.)

The Court: Gentlemen of the Jury, I am going to excuse you for the day until 9 o'clock tomorrow morning and [262] see Counsel in chambers.

We stand adjourned until 9 o'clock tomorrow morning.

(Thereupon, at 3:50 p.m., December 13, 1949, an adjournment was taken until 9:00 a.m., December 14, 1949.) [263]

December 14, 1949

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness, for further trial.

The Court: Note the presence of the jury and of the defendant. Are the parties ready to proceed?

Mr. Miho: Ready.

Mr. Hoddick: Ready for the plaintiff, your Honor.

ORESTUS CAVNESS

resumed the stand and testified further as follows:

The Court: Was there a pending question?

The Reporter: The last question was answered.

Mr. Hoddick: Would you read the last question and answer, please.

(Question and answer read.)

Cross-Examination

(Continued)

By Mr. Hoddick:

Q. Mr. Cavness, do you deny that you pushed Mr. Wells when he came up to the car?

A. Yes.

Q. Do you deny that you had a Vicks inhaler tube?

A. Yes.

(Testimony of Orestus Cavness.)

Q. At the time this struggle took place?

A. Yes.

Q. Do you deny that you were chewing on a Vicks inhaler [264] tube during the course of the struggle, or that you bit on one? A. Yes.

Q. Do you remember what you did during the course of the struggle?

A. No, I don't, but I couldn't have bit on a Vicks inhaler because I didn't have one.

Q. What do you remember about that struggle?

A. All I remember is when I got out of the car, Mr. Wells grabbed me by my left hand and Sousa by my right. Someone called me and a few seconds after that someone struck me across the head with a blackjack, and I went down, and I don't remember anything distinctly after that until I was on my way in the house. In fact, I don't remember exactly when I was in.

Q. Did you hear Mr. Wells say, "He has got it in his hand?" A. No, I didn't.

Q. You didn't hear that? A. No.

Q. Who had hold of you when you were struck by the blackjack?

Mr. Hoddick: Withdraw that question.

Q. (By Mr. Hoddick): How do you know you were struck by a blackjack? [265]

A. That I don't know. I just assumed it was a blackjack. It was something hard. I don't know what it was, because immediately I fell forward afterwards.

(Testimony of Orestus Cavness.)

Q. What position were you in when you received this blow?

A. I was facing Mr. Wells. You know how the car is parked, huh? You know how the car was parked. Well, I was facing opposite back to the car, to the side of the car, back to the side of the car.

Q. And how close to the car were you?

A. That I don't know.

The Court: Excuse me. This "back" business I don't understand. His back or the back of the car?

Mr. Hoddick: His back to the side of the car.

The Witness: My back was facing the left side of the car.

The Court: Your back was facing the left side of the car?

The Witness: Yes.

Q. (By Mr. Hoddick): Were you standing up, sitting down, kneeling, when you received the blow?

A. I don't remember the exact position.

Q. You don't remember?

A. No. I was standing up, though.

Q. Were you falling down when you received the blow? [266] A. No.

Q. You are sure of that?

A. I don't think so.

Q. Pardon? A. No, I was not falling.

The Court: Speak louder. You said you don't recall?

The Witness: No.

(Testimony of Orestus Cavness.)

Q. (By Mr. Hoddick): What were you doing at the time you received the blow?

A. Well, they had my arms, holding, holding me up. I don't remember exactly what was happening at the time I received the blow.

Q. You might have been falling?

A. No.

Q. Well, if you don't remember exactly, how do you know you might not have been falling?

A. I wouldn't have any reason to be falling at that particular time.

Q. Was this struggle a very strenuous one?

A. That I don't know.

Q. You don't remember; is that it?

A. I don't remember exactly what took place in the struggle, during the course of the struggle.

Q. How do you account for this lack of memory on your [267] part?

A. I mean, I was hazy; a blackjack, I mean——

Q. I am talking about what happened before you were struck by the blackjack.

A. How did I account for it?

Q. Yes.

A. I don't quite understand that question.

Q. Why don't you remember what took place before you were struck by the blackjack?

Mr. Miho: If your Honor please, there is nothing in the testimony so far that this witness has stated that he doesn't know what happened before he was struck, that he was hazy or anything before

(Testimony of Orestus Cavness.)

he was struck. He has made a clear and concise statement of what happened before he was struck.

The Court: I think the objection is good.

Q. (By Mr. Hoddick): Who had hold of you at the time you were struck, Mr. Cavness?

A. Mr. Wells and Sousa, I guess. I don't remember exactly who had my right arm.

Q. Anybody else?

A. I don't remember. I know there was quite a few officers, but who had me I don't know.

Q. When you were on the stand the other day in the absence of the jury, did you tell us that at the time you were [268] struck by the blackjack Officer Marcotte had hold of you?

A. No, I didn't.

Q. If I tell you that you did say that, was that a mistake?

Mr. Miho: If your Honor please, unless Mr. Hoddick is ready to tell us that actually such a statement was made by this witness—I have no recollection of such a statement; I have no record of it——

Mr. Hoddick: I am going to ask him if such a statement was made, and I can bring in the reporter to do it.

Q. (By Mr. Hoddick): Do you deny you made such a statement?

Mr. Miho: I still object that the question is argumentative, your Honor.

The Court: Not argumentative. The objection

(Testimony of Orestus Cavness.)

is, basically, whether or not he is quoting the record correctly.

Mr. Miho: Was it direct or cross-examination?

The Court: Better get the record.

Mr. Hoddick: First of all, I am quoting the record correctly.

The Court: Do you have a transcript here?

Mr. Miho: I have the transcript here. Which is it, direct or cross-examination? Well, I ask that the entire section be quoted; otherwise, it would be an erroneous quotation of the evidence, your Honor. He is just trying to get [269] one piece out of the whole thing. Unless it is started from the first question, it would be very misleading, your Honor.

The Court: Well, you would have an opportunity to go over that. All he is asking him now is whether he made a prior inconsistent statement. He is entitled first to give him an opportunity to refresh his recollection of what he said and an opportunity to admit or deny it before he asks specifically if he didn't say this the other day.

Mr. Miho: Wouldn't it be fair to ask him the question prior to that and quote exactly what the questions and answers were?

The Court: It seems to me the setting should be laid probably, but I am not trying his case; he is.

The Court: That is true, yet, in order to acquaint the witness and direct his attention to what you are talking about, in fairness you should give

(Testimony of Orestus Cavness.)

him the setting under which he is testifying.

Q. (By Mr. Hoddick): Mr. Cavness——

The Court: Just a minute. Before you do any quoting from the record, call his attention to the situation and give him a chance to admit or deny.

Mr. Hoddick: I am going to do that. [270]

Q. (By Mr. Hoddick): Mr. Cavness, do you remember my asking you when you were on the stand the other day in the absence of the jury: "What position were you in when you got hit on the head, or hit your head; were you standing up?" And your answer was to the last question: "Yes."

Do you remember that?

A. I don't remember that question.

Q. Now, do you remember the question that I asked you immediately after that: "And who had hold of you?"

A. I remember you asking me that question and I told you Mr.——

Q. And do you remember your answer: "That I don't know"? You don't remember that?

A. Who had hold of me at the time——

Q. That's right, when you were hit on the head with a blackjack; and you said, "I don't know."

A. Well, Mr. Wells had my right hand.

Q. Then I asked: "Did Mr. Wells have hold of you?" You answered: "I don't remember exactly who it was."

Do you remember that?

A. No, I don't, but I could have made the statement.

(Testimony of Orestus Cavness.)

Q. Then I said, "Well, Mr. Wells had hold of you, didn't he?" And you answered: "I don't know definitely."

Do you remember my asking if Mr. Sousa had hold of you and you answered, "I don't know that." And I asked, "Do [271] you know if Captain Whitford had hold of you?" And you answered, "No, I don't. Only two that I remember, Mr. Shaffer and Marcotte."

Do you remember answering that?

A. Not at the time when this took place, not at the time before I was hit.

Q. What? Not at the time before you were hit?

A. You asked that question like that? Ask the question again. Maybe I don't understand it.

Q. You say that Marcotte did not have hold of you at the time you were hit; at what time were you referring to when you said Shaffer and Marcotte had hold of you?

A. I don't think I made the statement that Shaffer ever had hold of me.

The Court: Wait a minute. I don't think he is following you.

Mr. Miho: Yes, the entire part should be read, especially the last part.

Q. (By Mr. Hoddick): I show you a transcript of what took place the other day in court in the absence of the jury, starting with this question: "What position were you in when you got hit on the head?" And then, "Who had hold of you?"

(Testimony of Orestus Cavness.)

And then your answer down here in response to my question: "Do you know if Captain Whitford had hold of you?"

"No, I don't. Only two that I remember, Mr. Shaffer and [272] Marcotte."

A. I was mistaken then.

Q. You were mistaken? A. Yes, I was.

Q. Did you see anything in Mr. Wells' left hand when he came over to the car?

A. I saw something in his left hand.

Q. Is this what you saw in his left hand (indicating)? A. I don't know.

Q. Did it look like this?

A. I don't remember exactly how it looked because, I mean, I didn't pay that much attention.

The Court: The record had better describe what "this" is.

Mr. Hoddick: Excuse me. I showed the witness Mr. Wells' narcotics badge.

The Court: I don't think Mr. Wells likes your description of that.

Mr. Hoddick: Badge of Narcotics Division, Agent of the Treasury Department.

Q. (By Mr. Hoddick): Mr. Cavness, what happened after you were taken into the house?

A. When I first got in the house, Mr. Wells suggested that I sit down and get myself together, and if I remember correctly, he advised the officer to release the handcuffs on [273] me so I could wash my face and get my hair straight. So after

(Testimony of Orestus Cavness.)

that was done, I was moving around, see, so he ordered to put the handcuffs back on.

Q. You say you were moving around?

A. Yes.

Q. What do you mean you were “moving around”?

A. I was nervous or hazy or something; he said I couldn’t stand still. That is what he said, and he told me to stand still or he would put the handcuffs on, so I guess unconsciously——

Q. Did you try to go out of the house?

A. No, I didn’t.

Q. At any time? A. No.

Q. Were the handcuffs put back on you?

A. Yes.

Q. Do you know why?

A. He said I wouldn’t be still, I wouldn’t stand still.

Q. Who put the handcuffs back on you?

A. I don’t remember exactly who. I think it was Abbey. I think it was.

Q. Do you remember how many times you fell down during the course of the struggle outside?

A. No, I don’t.

Q. The only thing you remember is getting out of the [274] car, seeing Mr. Wells, and receiving some kind of a blow on your head?

A. Mr. Wells grabbed hold of me, I remember that, and I didn’t receive a blow until a few seconds after. Somebody called me a “black son-of-a-bitch,”

(Testimony of Orestus Cavness.)

and in a few seconds I received a blow. That is when I fell. I don't remember anything after that. I don't even remember when they first put the handcuffs on me distinctly, but I remember when they proceeded to take me into the house.

Q. Tell me, where was Mr. Wells standing when you first saw him?

A. Right in the window of the car.

Q. In the window?

A. His head in the window.

Q. You saw him through the window then?

A. Yes.

Q. And you say that Mr. Wells did not say anything to you at that time? A. No, he didn't.

Q. When was the first time Mr. Wells said something to you.

A. The first I remember was when we got into the house.

Q. And what did he say there?

A. I think the officer handed me the paper or something, and I said I didn't feel like it. I told him just to submit [275] it, and he told me if I didn't feel something, and I said I didn't feel like it. I told him I didn't feel like it right then, so he left it with me. In fact, I was bleeding at the time when he offered that.

Mr. Miho: Speak louder and clearer, please.

The Witness: I said, in fact, I was bleeding at the time when he offered the warrant to me, so therefore I didn't have time to read it.

(Testimony of Orestus Cavness.)

Q. (By Mr. Hoddick): Did any of the officers take you out of the house during the course of their search? A. No, they didn't.

Q. The only time you left the house was when you were taken down to the police station?

A. I was took to the hospital.

Q. Well, to the hospital, and then you went to the police station? A. Yes.

Q. What did you eat for the ten days following arrest? A. I drank mostly juices, huh.

Q. Was that pursuant to doctor's orders?

A. No.

Q. You just weren't hungry? A. What?

Q. You just weren't hungry? [276]

A. No, I had to wear a plaster, this part (indicating). This was torn loose and I had to wear a plaster all over this, so I couldn't open my mouth.

Q. Do you know what cocaine is?

A. No, I don't.

Q. Do you deny you had any in your possession on July 19, 1949? A. Yes.

Mr. Hoddick: No further questions.

The Court: Redirect.

Redirect Examination

By Mr. Miho:

Q. Cavness, when it was all over and you were taken out of the house to be taken to the emergency hospital, did you notice anything on the ground about where the struggle took place?

(Testimony of Orestus Cavness.)

A. No, I didn't.

Q. Did you notice anything the next day?

A. Yes.

Q. What did it look like?

Mr. Hoddick: Objection. Improper redirect examination. On cross-examination we did not touch what might have been there or what might not have been there.

The Court: It is the first time we have heard anything about the next day. [177]

Mr. Miho: All right, I will withdraw it; I just wanted to get the entire picture.

The Court: All right go ahead. Technically, you are out of order.

Q. (By Mr. Miho): What did it look like, that you saw the next day? A. Like blood.

Juryman Andre: Can't hear.

Mr. Miho: Louder.

The Witness: Blood.

Mr. Miho: Now, I would like to read the rest of the part that Mr. Hoddick tried to make a lot out of, please.

Q. (By Mr. Miho): Do you remember the other day when in the absence of the Jury Mr. Hoddick was cross-examining you—I will read to you the rest of the part that he failed to read a while ago.

Mr. Hoddick asked you, "Do you know if Captain Whitford had hold of you?" You answered, "No, I don't. Only two that I remember, Mr. Shaffer and Marcotte."

(Testimony of Orestus Cavness.)

Question: "And Marcotte?" Answer: "Marcotte."

Question: "Those two had hold of you just before you got hit on the head?" Answer: "Shaffer is the one that done hit me. I am not sure because it was from behind."

Do you remember making that statement, you were hit from [278] behind? A. Yes.

Q. I ask you once more with relation to what Mr. Hoddick asked you: Are you quite sure it was Abbey, Officer Abbey—You know who Officer Abbey is, your neighbor across the street? A. Yes.

Q. Are you quite sure that it was Officer Abbey who re-handcuffed you in the house because you "won't stand still"?

A. He handcuffed me to Mr. Marcotte.

Q. That was in the house, wasn't it?

A. Yes.

Mr. Miho: That is all. Thank you.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

THOMAS MIN

called as a witness in behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: I am Doctor Thomas Min.

(Testimony of Thomas Min.)

The Court: Age?

The Witness: Thirty-two.

The Court: Residence Honolulu?

The Witness: Yes.

The Court: And you are a doctor engaged in private [279] practice?

The Witness: Yes, and I am also employed by the City and County in the Health Department.

The Court: When you say "doctor," you mean an M.D.?

The Witness: Yes, sir.

The Court: All right. You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Yes.

The Court: Take the witness.

Direct Examination

By Mr. Miho:

Mr. Miho: If your Honor please, Mr. Hoddick is willing to stipulate that he is a duly qualified and licensed physician and surgeon in the Territory of Hawaii.

The Court: Very well.

Mr. Miho: Cavness, will you stand up and come close to Dr. Min.

Mr. Hoddick: One second, Mr. Miho. I have no desire to keep any material information from the jury. I assume that your examination of the doctor

(Testimony of Thomas Min.)

and his examination of Cavness have to do with whatever injuries Cavness received in the course of the struggle.

Mr. Miho: That is right. [280]

Mr. Hoddick: Your Honor, I submit that such evidence is entirely immaterial to the issues presented in this case and has no connection therewith, on the charge that Cavness had unlawfully purchased narcotics and had them in his possession. I object to any questions relating to that subject.

Mr. Miho: It certainly has a material bearing on the defendant's credibility and the credibility of the other officers. They don't know anything about his being hit, your Honor, not a one of them. He is the only witness who can tell us whether he received injuries on that date or not.

The Court: You may proceed.

Q. Will you take a look at this defendant's face.

Mr. Miho: Open your mouth.

(Witness examines defendant.)

Mr. Miho: All right, Cavness, resume your seat, please.

Q. (By Mr. Miho): Dr. Min, you remember seeing that man whom you have just inspected at close quarters; is that right? A. Yes, I did.

Q. Sometime on July 19 you had occasion to give him some medical attention; is that correct?

A. Yes.

Q. At the emergency hospital? [281]

A. Yes.

(Testimony of Thomas Min.)

Q. At that time what did you find wrong with him?

A. Well, at the time of the examination, he was found to have a laceration on the scalp.

Q. About how large, please?

A. Oh, approximately two inches, between two and three inches in length.

Q. And was it an open wound? The scalp was opened?

A. Well, a "laceration" would mean that the skin edges were damaged and separated to a certain extent.

Q. And what kind of a wound was it, a straight laceration or jagged?

A. It was not straight as if it was cut by a knife. It was jagged.

Q. And what else did you find wrong with him?

A. He also had contusions of the right eye and right cheek.

Q. What does that mean in layman's ordinary language?

A. Well, contusion in the right eye would be a black eye, actually, swollen, bruised; and the cheek was also bruised, and he also had a laceration of the upper lip. We cleaned the injured area, the scalp was shaved about the wound, and two clips were inserted.

Q. In the scalp wound; is that right?

A. Yes, and he was discharged to the police.

Q. Do you recall whether you plastered his mouth or not to get the wound together?

(Testimony of Thomas Min.)

A. No, I have no note of that. We did not suture or put any clips in the lip wound. The scalp was treated by clipping.

Q. Well, you have inspected his left lip right now; do you recall whether there was sufficient injury there that it had to be closed together in order to heal it? A. No.

Q. May I go one step further: Do you recall whether the wound went to the inside?

A. Well, it extended into the inner surface of the mouth but it wasn't—at that time I didn't feel it necessary to apply any sutures.

Q. But the wound did go inside? A. Yes.

Q. And do you recall now whether you plastered it together or not?

A. No, I am sorry, I don't remember. We did apply antiseptics and dressing.

Q. You applied sulpha I notice from your medical report. A. Yes.

Q. Would a man receiving that kind of injuries on his lip have difficulty in eating for some time? Talking and [283] eating?

A. Well, it would be painful to take food, chewing and swallowing.

Mr. Miho: Thank you, that is all.

Cross-Examination

By Mr. Hoddick:

Q. Dr. Min, approximately how long does it take for the symptoms of a contusion to become apparent:

(Testimony of Thomas Min.)

A. Well, generally within a few minutes; a few minutes after a blow the area would be slightly swollen, and an hour or two later the area would be discolored.

Q. It would take an hour or two, though, for it to become discolored? A. Yes.

Q. Now, is that discoloration as readily apparent on the skin of a colored person as it is on the skin of a white person? A. No, it is not.

Q. Did you put a bandage over this laceration on the scalp? A. Yes, we did.

Mr. Hoddick: No further questions.

Redirect Examination

By Mr Miho:

Q. May I ask, Could you tell from the type of wound [284] that you saw in the back of his head what kind of an object could have caused such a wound on the back of his head?

A. Well, any blunt object, excluding a knife, razor, or those sharp instruments, being struck with a stick or club.

Q. Have you ever seen a blackjack in your life, Mr. Min? A. Yes.

Q. A blackjack could cause such a wound; is that right? A. Well, it could.

Mr. Miho: Thank you. That is all.

Q. And what time was it that you saw him, according to your records?

(Testimony of Thomas Min.)

A. That was at 8:03 p.m. that he was first brought into the emergency room.

Q. 8:03? A. Yes.

Q. About three minutes after eight o'clock?

A. Yes.

Recross-Examination

By Mr. Hoddick:

Q. Dr. Min, assuming that Mr. Cavness was on the ground and suddenly raised himself and hit the back of his head under the edge of the front fender of a car or under the bumper, or assuming that and supposing he hit his head in that [285] manner, is it possible that the laceration could have resulted from that type of a blow on the head?

A. Yes.

Mr. Miho: Just a moment, if your Honor please. I think that question is hypothetical, but it is not quite proper. There is no evidence that there was such a thing in this case. It is a hypothetical question on a hypothetical question.

Mr. Hoddick: There is no evidence that he was hit on the head by a blackjack.

Mr. Miho: But there is evidence that we have the blackjack on the premises.

Mr. Hoddick: You have a car.

Mr. Miho: There are no hypothetical guesses that he might have hit the car bumper.

The Court: Overruled.

Mr. Miho: Save an exception.

The Court: What is your answer, Dr.?

(Testimony of Thomas Min.)

Mr. Hoddick: The answer was "yes," your Honor.

The Witness: Yes.

Mr. Hoddick: No further questions.

Mr. Miho: That is all, Dr. Min.

The Court: Excused.

(Witness excused.)

The Court: Next witness. [286]

Mr. Miho: No further witnesses, your Honor.

The Court: Does the Government have any rebuttal:

Mr. Hoddick: Officer Marcotte, please.

ROGER C. MARCOTTE

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name, age, residence, occupation, and citizenship.

The Witness: Roger C. Marcotte; House 59 Skilled Camp, Aiea; age 28 years.

The Court: Occupation?

The Witness: Police officer with the Honolulu Police Department.

The Court: Citizenship?

The Witness: United States citizen.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

(Testimony of Roger C. Marcotte.)

Direct Examination

By Mr. Hoddick:

Q. Mr. Marcotte, how long have you been with the Honolulu Police Department?

A. A little over three years.

Q. Do you know the defendant Orestus Cavness?

A. I do. [287]

Q. Will you point him out, please.

A. He is sitting over there next to Mr. Miho.

Mr. Miho: I will stipulate he is very well acquainted with Mr. Cavness.

Q. (By Mr. Hoddick): Did you have occasion to go to the premises of Mr. Cavness on July 19, 1949?

A. I did.

Q. Were you in the house with Mr. Cavness that evening?

A. Yes, I was.

Q. Were you there when—Was Mr. Cavness handcuffed or not when you arrived?

A. When I arrived at the scene, he was handcuffed.

Q. Were those handcuffs taken off at any time?

A. Yes, they were.

Q. And where were they taken off?

A. After we entered the house.

Q. What transpired after they were taken off?

A. Well, Mr. Wells is the person who ordered the handcuffs taken off, and they were taken off, and Mr. Cavness was asked to have a seat. He was very nervous and kept jumping and moving around,

(Testimony of Roger C. Marcotte.)

and was very excited, and was very much worried about people going into his bathroom, and somebody was standing out in front near the car.

Mr. Miho: Just a moment, if the Court please. I move that any statement as to what he thought was in the [288] mind of this defendant, if your Honor please, be stricken, and he be confined only to what he saw or what he didn't see, and on rebuttal only. He is a rebuttal witness here.

Mr. Hoddick: I stipulate, your Honor that that remark of Mr. Marcotte that Mr. Cavness was worried about anybody going into his bathroom may be stricken.

The Court: All right, it may go out. The jury is instructed to disregard it.

Q. (By Mr. Hoddick): Were the handcuffs placed back on Mr. Cavness?

A. Yes, sir, they were.

Q. Why?

A. He tried to run out of the house.

Mr. Miho: If your Honor please, I move that be stricken. He has only to tell us what Cavness did, and the only thing he has told us is that Cavness was nervous and couldn't sit down. There is nothing for him to say that he was trying to run out of the house.

The Court: He is here saying so.

Mr. Miho: That is a conclusion. He has been saying he was nervous, couldn't sit down. There is nothing so far that he was running out of the house.

(Testimony of Roger C. Marcotte.)

The Court: He just said so. Overruled.

Mr. Miho: Save an exception.

Mr. Hoddick: No further questions. [289]

The Court: Cross-examination.

Cross-Examination

By Mr. Miho:

Q. Did he ever run up to the door to try to get out?

A. That is why I caught him, at the door.

Q. At the door? A. Yes, sir.

Q. You and who else caught him at the door?

A. Myself.

Q. Which door? A. The front door.

Q. And how many officers were on the place?

A. Officer Pestano I believe was in the same room.

Q. And who else? You, Officer Pestano, I imagine Wells was there, too?

A. I believe he might have been.

Q. And Shaffer was there?

A. I don't know whether he was in that room or not.

Q. At least there were five or six officers in the room? A. No, sir, not that one room.

Q. You mean you got to the scene before the other officers got there? A. No, sir.

Q. Where were they?

A. They were making a systematic search of the house. [290]

Q. They were searching already?

(Testimony of Roger C. Marcotte.)

A. I believe they were.

Q. They were making a search when you got there?
A. No, not when I got there.

Q. When he tried to escape?

A. That's right.

Q. When he tried to escape they were in the process? Were they or weren't they?

A. They were receiving instructions from Mr. Wells.

Q. Where were you?

A. Right alongside of Cavness.

Q. And who else was with you?

A. I believe Pestano was standing off to the side near the bathroom entrance at the time. That is about all that I can visualize was there.

Q. Pestano was near the bathroom door?

A. Yes.

Q. And you were in which room, the living room or bedroom?
A. In the living room.

Q. In what part of the living room?

A. Right next to his armchair.

Q. And where is that armchair?

A. It is straight in about——

Q. Across the living room from the door; isn't it? [291]
A. That's right.

Q. And he was trying to reach the door from there with you right there, to try to escape from you?
A. I was standing alongside of him.

Q. Across the living room, you were standing

(Testimony of Roger C. Marcotte.)

by the armchair right by him and he tried to escape from the front door?

A. That is correct.

Q. You are sure you are telling us the truth under oath, aren't you?

A. I most certainly am.

Q. Tell us whether he was bleeding at that time or not? A. Yes, he was.

Q. He was still bleeding? A. Yes, sir.

Q. In other words, he hadn't received first aid yet? A. No, sir.

Q. And who was he handcuffed to, again?

A. I handcuffed him to myself.

Q. You handcuffed him? A. Yes, sir.

Q. It was not Abbey who handcuffed him at that time? A. No, not that time.

Q. When was it that he handcuffed him?

A. I understand he might have handcuffed him outside. [292]

Q. You understand he might have handcuffed him outside, but so far as in the room was concerned, you are the only one who handcuffed him?

A. Yes.

Q. And how many times did you handcuff him?

A. Only one time.

Q. Only one time. And how long did you have him handcuffed to you?

A. Oh, for approximately ten minutes.

Q. Then what did you do?

A. Well, he promised that he wouldn't run away again and he would relax.

(Testimony of Roger C. Marcotte.)

Q. He promised he wouldn't run away again?

A. That is correct.

Q. Give us his exact words. What did he say to you?

A. Well, I told him—He didn't say anything. After I asked him if he would sit down and relax and take it easy, I would take the handcuffs off him, you know, he said "OK, I can take it easy now."

Q. So you took the handcuffs off?

A. So I took the handcuffs off.

Q. So he never said anything about running away? A. No.

Q. You never asked him whether he would run away again? A. I did, yes. [293]

Q. You never told us just now; you recited the entire conversation?

A. I didn't recite the entire conversation.

Q. You didn't tell us he said he wouldn't run away.

A. You interrupted me before I had time to recite the entire conversation.

Q. All right. I won't ask you any more questions on that one.

Did you go into the bathroom after you released him, after ten minutes or so, you say, when he tried to wash himself? A. I did.

Q. Do you remember Paul Shaffer going in or coming in at some time during that operation?

A. No. I remember Pestano being in there. I was directly by him.

(Testimony of Roger C. Marcotte.)

Q. Did you hear anything, by any officer's conversation or such, to this effect, that "You must have hit your head on a bumper and that is how you got the injuries in the back of your head"?

A. I heard something to that effect.

Q. Who said such a thing, if you know?

A. I don't recall just now.

Q. Do you remember Mr. Wells' telling you, "Why don't you take that handcuff off of Cavness?"; do you remember Mr. [294] Wells' telling you that?

A. Mr. Wells did order me to take the handcuffs off Cavness. That was the first time before he was handcuffed the second time by myself.

Q. But you didn't abide by his instructions right away, did you? It took Mr. Wells some time to get you to finally release the handcuffs off Cavness; is that right?

A. I believe I had to get a key.

Q. Wasn't it your handcuff? Didn't you tell me you handcuffed him?

A. The second time it was my handcuff, the time he was handcuffed in the house, Mr. Miho.

Q. That was your handcuff?

A. That was my handcuff.

Q. Well, the keys were with you? A. No.

Q. Well, who holds the key to your handcuffs?

A. I don't have to take my keys around with me.

Q. How did you get the handcuffs released if you didn't have the key?

A. I borrowed a key from somebody else.

(Testimony of Roger C. Marcotte.)

Q. You mean the handcuff is uniform?

A. That is correct.

Q. It goes to release any handcuff?

A. That is correct. [295]

Q. Thank you for that information. I will remember that.

Q. You didn't have your key? A. No, sir.

Q. So if you handcuffed somebody by error and that person was ready to bleed to death, you couldn't borrow a key, you would let him bleed to death; is that the kind of an officer you are?

A. I guess he would have to bleed to death.

Q. If this defendant was seriously injured at that point, he had a cracked skull and the time was also important to this defendant——

A. He wouldn't have been handcuffed.

Q. (Continuing): ——and you couldn't borrow a key, what would you do, let him bleed to death?

A. He wouldn't have been handcuffed.

Mr. Miho: You are some officer. That is all.

Mr. Hoddick: No further questions.

The Court: Next witness.

(Witness excused.)

Mr. Hoddick: No further witnesses, your Honor.

The Court: Any surrebuttal?

Mr. Miho: No, your Honor.

The Court: The evidence on both sides is submitted then? [296]

Mr. Miho: Yes, your Honor.

Mr. Hoddick: Yes, your Honor.

The Court: Very well, are your requested instructions on both sides ready?

Mr. Hoddick: Yes, we have ours ready.

Mr. Ahrens: Your Honor, at this time we would like to move for a judgment of acquittal on the grounds as previously stated, that the evidence is insufficient to sustain a conviction. We would like to be heard on the motion in the absence of the jury.

The Court: All right. State your grounds first and I will hear argument. The same grounds?

Mr. Ahrens: The same grounds.

The Court: All right, I will excuse the jury at this time until 2 o'clock this afternoon.

(Exit jury.)

(Argument by Counsel out of hearing of jury.)

(Motion denied and exception taken.)

(Thereupon, at 11:10 a.m., a recess was taken until 2:00 p.m. of the same day.) [297]

Afternoon Session

The Court: Criminal 10,256. Note the presence of the jury and of the defendant, together with his attorney.

The evidence being submitted at this time, Counsel may present their respective arguments to the

jury. Mr. Hoddick, you may present your argument first.

(Argument by Mr. Hoddick.)

(Argument by Mr. Miho.)

The Court: We will take a short recess.

(Recess had.)

The Court: Note the presence of the jury and the defendant, together with his attorney. Mr. Hoddick you may reply.

(Argument by Mr. Hoddick.)

The Court: Gentlemen of the Jury, if I may now have your attention I will give you the rules of law that are applicable to this case to guide you in reaching a verdict.

Someone has said in the course of argument that this is an important case. It is. Every criminal case is important, important to both the Government and to the defendant. You can readily recognize why, in that every case of a criminal nature involves the possibility, upon conviction, of someone's being deprived of his freedom. Consequently, it is appropriately and correctly said that this is an important case, [298] and I am sure you recognize it as such.

Last September the grand jury, upon hearing only that which the Government presented to it, in other words, upon hearing only one side of the case, determined that this defendant should be indicted for violating a particular Federal law, and, conse-

quently, the grand jury returned an indictment, to which the defendant pled not guilty, and thus the issue was framed which you gentlemen have been called upon to determine, you having the advantage of hearing both sides of the case, the Government's side and the defendant's side.

The indictment reads that

“The Grand Jury Charges:

“That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of cocoa leaves, to wit, 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.”

Now that is the charge which the Government has laid and which it is incumbent upon it to prove as charged beyond a reasonable doubt. That is true in every criminal case. The Government must sustain its charge beyond a reasonable doubt. [299] It must prove each and every essential element of the crime to your satisfaction beyond a reasonable doubt, which I will define for you in a moment.

The pertinent law on this subject, in so far as narcotics are concerned, provides that a tax shall be levied and paid upon cocoa leaves, “any compound, salt, derivative, or preparation thereof produced in, or imported into, the United States, and

sold, or removed for consumption or sale—" and it describes the manner in which the tax shall be paid.

It further provides, coming directly to Section 2553(a), which is the section under which this charge is laid, that

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a)—" which is the section I started to refer to, being a general reference which includes cocoa leaves. Repeating:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . ."

It goes on to provide certain exceptions, namely, that [300] the provisions of the section which I have just read to you shall not apply "to any person having in his or her possession any of the drugs mentioned in Section 2550(a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer

upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription."

The other exception is that this law shall not apply "To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away."

Now, you will notice that the indictment here charges this defendant with having knowingly, wilfully, unlawfully, and feloniously purchased, with having purchased, as I have just described, having "knowingly, wilfully, unlawfully and feloniously purchased a derivative of cocoa leaves, to wit, [301] 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), . . ."

This indictment simply states the charge. It is not in the slightest degree evidence of any description. So, from the fact that the defendant has by the grand jury been charged, or indicted, you are not to draw any inference whatsoever adverse to the defendant. It is incumbent upon the Govern-

ment, to repeat, to prove the charge as laid beyond a reasonable doubt.

I direct your attention to the fact that the indictment alleges an unlawful purchase, but you have heard little, if anything, in this trial of a purchase. The reason is that this particular Federal law is unique in that it provides that once the Government has established that there was conscious possession of one of the described drugs by a person, that person has the burden of explaining satisfactorily that that possession was lawfully acquired. There are very few Federal laws that have such a presumption, but this is one.

And I read it again from the statute;

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found.”

Consequently, it was incumbent upon the Government here, and it still is, to have proven to your satisfaction beyond a reasonable doubt that the articles introduced in evidence did contain a drug described by this law, namely, cocaine; that they did not have any tax-paid stamps upon them; and that the defendant did have conscious possession of them.

At that point, if the Government has proven those three elements to your satisfaction beyond a reasonable doubt, it is then incumbent upon the defendant, under his particular law, to explain to your satis-

faction that his possession of those drugs was legitimate and lawful.

In this particular case the defendant has denied that he possessed the articles which the Government asserts and alleges that he had possession of. Consequently, this case is reduced to a question of, basically, whether or not the Government has proved beyond a reasonable doubt that he did or did not have possession, consciously, of capsules containing the drug cocaine, which capsules, so containing cocaine, did not have upon them stamps indicating that they were tax paid. As I have indicated before, this is the framework position of this case, and I repeat again that the indictment which charges this offense is in no sense evidence or proof that the defendant has committed the alleged crime; that it is incumbent upon the Government to prove beyond a reasonable doubt that which I have outlined to you in order to sustain [303] the charge.

A few preliminary remarks and then I will come directly to some specific instructions.

As you probably have gathered from your experience at this trial, though it be your first one, as jurors in this court, evidence is of two kinds, namely, direct, positive evidence and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. On the other hand, circumstantial evidence is proof of such facts and circumstances sur-

rounding a crime from which a jury may infer others and connected facts which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence is regular and competent at the trial of a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced, but to be of value the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of guilt.

A reasonable doubt, gentlemen, which I have promised I [304] would define for you, is not as mysterious as it sounds. It is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly detestable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might with reason entertain consistently with a conscious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility, and decision, in determining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is

created by the want of evidence, as well as possibly the evidence itself.

It is not, however, a speculative, imaginary, or conjectural doubt. It is not incumbent upon the Government in the trial of any criminal case to prove its case beyond all possibility of doubt. That would be impossible.

A juror, however, must be satisfied beyond a reasonable doubt, and he is so satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

You gentlemen are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, [305] their manner of testifying, their apparent candor or frankness or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly.

In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling, or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any witness in this case has knowingly or wilfully sworn falsely to any material fact in this trial, or

that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading, or imposing upon you, then you have the right to reject the entire testimony of such witness, except in so far as the same is corroborated by other credible evidence, or believed by you to be true.

Now, gentlemen, if during the trial I have referred to any fact in this case, it has not been to intimate to you any opinion which I have of that fact, although I have the right, under the law, to express an opinion on that subject. However, it is not my purpose to invade the province of the jury. It is your duty to find the facts of this case. It is your [306] exclusive duty. You and you alone are the judges of the facts of this case and of the credibility of the witnesses. If you have any idea that I have an opinion about this case of the guilt or innocence of this defendant, I want you to disregard it. I want you to arrive at your own independent conclusion from the evidence which has been presented and all the circumstances detailed by the witnesses.

Every defendant in a criminal case, and in this case, enters upon the trial clothed with a presumption of innocence. Every defendant is presumed to be innocent until he is proved guilty by the requisite degree required by the law, namely, beyond a reasonable doubt. This presumption of innocence is not a mere form to be disregarded by the

jury at pleasure, but it is an essential, substantial part of the law of the land, and it is binding upon the jury in this case, as in all criminal cases, and it is the duty of the jury, to give the defendant in this case the full benefit of this presumption and to acquit the defendant unless the evidence in the case convinces you of his guilt as charged beyond a reasonable doubt.

This presumption of innocence remains with the defendant until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt, and if, upon full consideration of all of the facts and circumstances in evidence, you entertain a reasonable doubt of his guilt, you [307] must give him the benefit of it and acquit him.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exist in the mind when the jury is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the Court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you must return a verdict of acquittal.

As I have indicated, it is incumbent upon the Government to have proved to your satisfaction

beyond a reasonable doubt that the defendant knowingly had conscious, physical possession of the cocaine upon which there were no tax-paid stamps before the statutory presumption comes into operation. Conscious, physical possession of cocaine by the defendant, as I have indicated by my reference to the statute, creates a presumption that the defendant unlawfully purchased such cocaine as charged in the indictment.

While the indictment charges the defendant with the unlawful purchase of eight capsules of cocaine, you may convict the defendant if from the evidence and from it alone, and [308] on the basis of the presumption of guilt arising from possession of cocaine, you find that beyond a reasonable doubt the defendant unlawfully purchased any quantity of cocaine. If you are convinced beyond a reasonable doubt that the defendant had in his possession and knew that he had in his possession cocaine to which the appropriate tax-paid stamps were not affixed, you must find the defendant guilty of the offense charged in this indictment, for the defendant has not explained any possession; indeed has denied having possession.

However, if you have a reasonable doubt as to whether or not the defendant had cocaine in his conscious and physical possession on July 19, 1949, that doubt you must resolve in favor of the defendant and return a verdict of not guilty.

“Possession” is a term of common meaning and understanding and it means that it is a condition of

facts under which one can exercise his power over a physical thing at his pleasure to the exclusion of all other persons. I believe I have already covered this, but I will go over it once again in accordance with this requested instruction. As I have said, the defendant is presumed to be innocent and that presumption of innocence remains with him until his guilt is established by the evidence to your satisfaction beyond a reasonable doubt; and if, after a full consideration of all of the facts and circumstances in evidence, you do entertain a reasonable doubt of his guilt, then you must give him the [309] benefit of it and return a verdict of not guilty.

However, if you find from the evidence that the defendant had conscious, physical possession of a quantity of cocaine upon which there were no tax-paid stamps, then a presumption arises under the law that the defendant is guilty of the offense charged in the indictment.

From time to time during the course of the trial, upon appropriate motions, the Court ordered stricken from the record and from the consideration of the jury certain things and further instructed the jury that, being stricken, that material could not be considered by you. I remind you once again that in your deliberations you may not under any circumstances consider anything that has been stricken from the record in this case. You are to decide this case upon the evidence which the Court allowed to come before you, and upon that alone.

I also wish to invite your attention to the fact

that if you have derived any notions of how I might feel, based on any of my rulings made during the course of the trial, you must completely disregard that, for the rulings during the course of the trial are not for your consideration. They are not evidence. The Court, in making its rulings, was not expressing any opinion of the guilt or innocence of the defendant, but was merely ruling the issue which the jury is to determine after weighing all of the testimony in this case in the light [310] of the rules of law expressed in the Court's instructions.

You are the sole judges of the sufficiency of the evidence and the credibility of the witnesses, and in passing on the credibility of such witnesses it is your right and your duty to take into consideration their prejudices, if any, their motives for testifying as they have done, or any other influences surrounding them, which may have induced them to testify in a particular way, if any such have been shown by the evidence in this case.

In considering the evidence, if you can reasonably account for any act in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to so do, and if you have a reasonable doubt of his guilt, you must acquit him. If the testimony in this case in its weight and effect be such as to warrant two conclusions, the one favoring the defendant's innocence and the other tending to establish his guilt, law and justice demand that the jury shall adopt

the former and find the accused not guilty. Under such circumstances the Government would not have proved its case as required beyond a reasonable doubt.

An inference of fact cannot be drawn from premises which are uncertain, but the facts upon which an inference may legitimately rest must be established by direct evidence as if they were the very facts in issue. It follows, therefore, that one presumption cannot be based upon another presumption. [311] To find a fact by presumption or inference, the inference should be a logical deduction and reasonably certain in the light of all the other proper presumptions and collateral facts.

I am sure that you are aware of this, but I wish to instruct you in this regard: A person charged with a crime cannot and must not be convicted upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him of being guilty. What the law requires, before a person can be convicted of crime, is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of his innocence.

If, after considering the whole of the case and after full deliberation with your fellow jurors, any juror should still entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty nor to be influenced in so voting

for the single reason that others of the jury shall be in favor of a verdict of guilty.

I believe, gentlemen, the requested instructions have been adequately covered and that, taken together with the Court's general instructions, they are sufficient to enable you to reach a verdict in this case. I am going to excuse you in a moment and for but a moment while I hear the attorneys [312] briefly on a point of law, after which you will be recalled and allowed to retire to the jury room. Unfortunately, the jury room in this buliding is not all that it should be, so I am perfectly willing to exclude everyone from the court room and allow you to use the court room as the jury room. I am sure you will be more comfortable.

Then when you do retire to deliberate upon your verdict your first order of business will be to elect from amongst your number one to serve as foreman. After you have deliberated upon your verdict and have reached a verdict, you will notify the Marshal, and he in turn will notify the Court, and the Court will convene to receive your verdict.

Two forms have been prepared for your use, and you will use the form which corresponds to the verdict which you have reached.

At this time and before swearing the Marshal to take charge of the jury, I will ask the jury to step outside a moment while I hear Counsel. Don't go too far away.

(Exit jury.)

The Court: The jury is now absent.

(Defense objected to refusal to give Defendant's Instructions Nos. 1, 12, 13 and 16; to No. 15 given as amended; also to the giving of Government's Instructions Nos. 5, 6 as amended, and 8. The objection to No. 6 was on the grounds that it was incomplete inasmuch as the words "or not from the [313] original stamped package" were not included. Objection also on the basis that the presumption is unconstitutional as amended in 1944, with reference to the instruction concerning presumption.)

(Objection overruled. Exception noted.)

The Court: The record may now show that the jury has been recalled and is present, as is the defendant.

It is in order now to swear the Marshal to take charge of the jury during the time it is deliberating.

Before we do that, however, I want to say that to the jury during their deliberations will be available the things which have been admitted in evidence, and only those things, plus the actual indictment, which, I again repeat, is not evidence, but is simply a formal charge which the Government is required to prove to your satisfaction, as I have told you so many times, beyond a reasonable doubt.

Now, Mr. Clerk, I believe I have taken care of all of the odds and ends. You may proceed to swear the marshals.

(Marshals Otto F. Heine and Emmanuel Moses sworn.)

The Court: Very well, the court room will be cleared and turned over to the jury. The exhibits will be available. The jury may call for them, or they may indicate that they wish them left here. Do you want them left in the room?

Juryman: Yes. [314]

The Court: All right. Mr. Clerk, leave the exhibits.

(The jury went out for deliberations at 4:30 p.m. and returned at 6:10 p.m.)

The Clerk: Criminal 10,256.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Gentlemen of the jury, I am advised by the Marshal that you have arrived at a verdict. Is that correct? Who is the foreman?

Mr. Andre: Yes, your Honor.

The Court: Mr. Andre, that is a correct report that the jury has arrived at a verdict; therefore, will you please, being the foreman, hand the verdict to the Clerk. The defendant will rise. The Clerk will read the verdict.

The Clerk: (Reading): "Verdict.

"We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Orestus Cavness, guilty as charged in the indictment herein.

“Dated: Honolulu, T. H., this 14th day of December, 1949.

“/s/ LEO F. ANDRE,
“Foreman.”

The Court: Such, Mr. Foreman, is the verdict of the [315] jury?

The Foreman: Yes, your Honor.

The Court: So say you all, gentlemen of the jury?

The Jury: Yes.

The Court: Very well, let the verdict be recorded.

Mr. Ahrens: At this time we would request that the jury be polled.

The Court: Very well. Will you poll the jury, please.

Mr. Koseke, what was your determination on the issue?

Mr. Koseke: Guilty, your Honor.

The Court: Thank you. Mr. Parish?

Mr. Parish: Guilty, your Honor.

The Court: Mr. Anderon?

Mr. Anderson: Guilty, your Honor.

The Court: Mr. Dole?

Mr. Dole: Guilty, your Honor.

The Court: Mr. Hatchell?

Mr. Hatchell: Guilty, your Honor.

The Court: Mr. Benedict?

Mr. Benedict: Guilty, your Honor.

The Court: Mr. Yoshioka?

Mr. Yoshioka: Guilty, your Honor.

The Court: Mr. Clark?

Mr. Clark: Guilty, your Honor. [316]

The Court: Mr. Bomke?

Mr. Bomke: Guilty, your Honor.

The Court: Mr. Andre?

Mr. Andre: Guilty, your Honor.

The Court: Mr. Moyers?

Mr. Moyers: Guilty, your Honor.

The Court: Mr. Turner?

Mr. Turner: Guilty, your Honor.

The Court: Very well, the poll of the jury may be recorded and the verdict may now be recorded.

Mr. Ahrens: At this time we would like to note an exception to the verdict as being contrary to the law and weight of the evidence.

The Court: It may be noted at this time. The jury is excused.

(Thereupon, at 6:20 p.m., December 14, 1949, the hearing in the above-entitled matter was adjourned.) [317]

Certificate

I, Lucille Hallam, Official Reporter, United States District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in Criminal No. 10,256, United States of America v. Orestus Cavness, December 12, 13 and 14, 1949, before Hon. J. Frank McLaughlin, Judge.

Dated: January 26, 1950.

/s/ LUCILLE HALLAM. [318]

In the United States District Court
for the District of Hawaii

Criminal No. 10,256

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORESTUS CAVNESS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

As to testimony, stipulations, and rulings in the
above-entitled matter, held in Honolulu, T. H., De-
cember 29, 1949.

Before:

HON. J. FRANK McLAUGHLIN,
Judge, and Jury.

Appearances:

K. MIHO, ESQ., and
JOHN E. AHRENS, ESQ.,
Fong, Miho & Choy,
Suite 202, Alakea Building,
Honolulu, T. H.,

Attorneys for the Defendant.

HOWARD K. HODDICK, ESQ.,
NAT RICHARDSON, JR., ESQ.,
Assistant United States District Attorneys,
Appearing for the Plaintiff.

The Clerk: Criminal No. 10,256, United States of America vs. Orestus Cavness. Hearing on motion of judgment of acquittal and alternative motion for a new trial.

The Court: This is the day appointed to hear the motions.

Mr. Ahrens: That is right, sir. We are ready for the Defendant.

The Court: Very well, is the Government also ready?

Mr. Hoddick: Ready for the Plaintiff, your Honor.

The Court: All right, Mr. Ahrens.

Mr. Ahrens: The Court indicated on prior hearing it desired that the argument be confined mainly to the two new points, unless other new arguments were to be put forth with reference to the other grounds.

The Court: That is right.

Mr. Ahrens: Now, I will confine the argument mainly to the two new matters, with the exception of going slightly into the question of Constitutionality. I have been fortunate enough to trace the history of the law, so I will dwell on that for a few minutes.

The Court: Yes.

Mr. Ahrens: But, nevertheless, it is still earnestly [1] urged that the grounds as argued previously still be taken into consideration by the Court.

The Court: Yes.

Mr. Ahrens: With reference to the matter of Mr. Samuel A. Parish's being a reserve police

officer, I believe Mr. Hoddick will be willing to stipulate that Mr. Parish is a member of the reserve police organization in the City of Honolulu.

Mr. Hoddick: That is correct.

The Court: Also, I think it can be agreed by all that since the last time I talked to you, the reporter in reading further in her notes did find something at variance with what I had told you the other day.

Mr. Ahrens: Yes, sir, thank you.

The Court: All right. Mr. Parish, one of the jurors selected and sat on the trial was a member of the reserve police.

Mr. Ahrens: First of all, I would request that the reporter read back that particular part of the transcript relating to the question that Mr. Miho put to the jury as a whole when questioning one particular juror, and I believe Mr. Hoddick will be willing to stipulate that Mr. Parish at that time, although not in the jury box, was present in the court room as a member of the panel at large and within hearing distance of the question. Will you stipulate to that [2] Mr. Hoddick?

Mr. Hoddick: I don't know whether Mr. Parish heard the question put to the jury box or not.

Mr. Ahrens: The stipulation I am requesting is that Mr. Parish was within hearing distance.

The Court: If Mr. Miho spoke loud enough.

Mr. Hoddick: That is a matter of fact.

The Court: He was in the room when Mr. Miho said whatever he did say. Whether he actually heard or not, we don't know.

The Reporter (Reading): "Question (By Mr. Miho): Have any of you jurymen served as police reserve officers in the police force at any time?"

Mr. Hoddick: Who was he questioning?

The Reporter: Mr. Kramer.

(Argument by Mr. Ahrens as to matter of Mr. Parish.)

Mr. Ahrens: Now I would like to touch briefly on the question of the constitutionality——

The Court: Before you come to that, how about your other point about the juror who made the telephone call?

Mr. Ahrens: Well, I can get to that now, if you want me to.

The Court: I think it logically relates to this matter. If it throws you off——

Mr. Ahrens: No, no, not at all. I will want—I think it will be necessary, may it please the Court, that we have Mr. Heine and Mr. Moses, and Mr. Clark called as witnesses in the case in that particular order.

The Court: All right. Will you arrange to line them up in that order. I will take a recess and hear them after the recess.

(Recess had.)

The Court: On this point, you, Mr. Ahrens, wish to introduce evidence?

Mr. Ahrens: May it please the Court, I would like Marshal Heine to be called to the stand, please.

The Court: Mr. Heine.

OTTO F. HEINE

called as a witness by attorney for the Defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ahrens:

Q. Will you state your name, age, residence, occupation, and citizenship, please.

The Court: Excuse me?

Mr. Ahrens: Is that necessary, your Honor?

The Court: It is not absolutely necessary, but you tickled my fancy by doing it.

The Witness: My name is Otto F. Heine; age 63; residing at 929 Ocean Drive, Honolulu, Territory of Hawaii. [4] At present I am United States Marshal for the District of Hawaii, Territory of Hawaii.

The Court: Citizenship?

The Witness: Beg pardon?

The Court: Citizenship?

The Witness: I am, sir.

The Court: Citizen of the United States?

The Witness: Citizen of the United States of America.

The Court: Exclusively?

The Witness: Exclusively.

(Witness temporarily withdrawn to have questions asked of Mr. Parish read by the reporter.)

(Witness resumed stand.)

(Testimony of Otto F. Heine.)

Q. (By Mr. Ahrens): Mr. Heine, on December 14 of this year were you duly authorized by the Clerk to take charge of the jury in Criminal No. 10,256?

A. I would answer that question "yes" together with Deputy Moses.

Q. Were you instructed not to talk to any of the jurors, and were you instructed not to allow them to talk to anyone other than themselves?

A. I was.

Q. Did any of the jurors——

Mr. Ahrens: I withdraw that question. [5]

Q. (By Mr. Ahrens): Mr. Heine, what happened after you locked the jury in the court room?

A. The jury was not locked up, sir, at that time.

The Court: Wait a minute, Mr. Heine.

The Witness: He asked me the question.

The Court: Yes, I know. You know what he is asking for, but that isn't the question he asked you. He asked you what happened after they were locked up.

The Witness: I understood him the other way.

Q. (By Mr. Ahrens): Will you relate to us the events, chronologically, that happened, from your own knowledge, so far as you know, from the time that you were authorized to take charge of the jury, together with Mr. Moses.

A. From the time I was authorized by the Court to take care of the jury, one of the jurors

(Testimony of Otto F. Heine.)

by the name of Herbert Clark came to me and asked me if he could 'phone his garage. That was before they started deliberating.

Q: Let me interrupt you one second. Where were you at this time? Was the court room cleared?

A. The court room was absolutely cleared.

Q. Absolutely cleared?

A. Yes, sir.

Q. Just the jury, you, and Mr. Moses present?

A. The jury, myself, and Deputy United States Marshal Emanuel Moses. [6]

Q. Will you go on, please.

A. Beg pardon?

Q. Will you continue from the time Mr. Clark approached you.

A. Well, after that, as I told you, one of the jurors asked me if he could 'phone his garage. He was very anxious about their locking it up and he wouldn't be able to get to his garage.

Q. Do you know his name?

A. Yes. Herbert Clark.

Q. Thank you. Go on.

A. I told him "yes." So I sent Deputy Moses along with him to see that he spoke nothing else, just about the automobile. And at that time I stayed behind to take care of the other eleven jurors, while Moses in company—while Mr. Clark, in company of Deputy Moses, went to my private office. And Mr. Thomas R. Clark, my chief deputy,

(Testimony of Otto F. Heine.)

was sitting there, too. What conversation they had I don't know.

Q. Are you telling this of your own knowledge as to what happened in your office, so far as Deputy Clark is concerned?

A. I saw Deputy Clark sitting there. I don't know what happened. I was in the court room at that time, Mr. Ahrens.

Q. When Mr. Clark approached you, do you recall his [7] exact words?

A. Approached me here in the court room?

Q. Yes.

A. Yes, he said he wanted to telephone to the garage about his automobile.

Q. What?

A. About his automobile.

Q. That is the best that you recall?

A. Yes.

Q. That was the only thing that he wanted to make a 'phone call about?

A. I believe so.

Q. That is all that you know?

A. That is all that I know.

Q. Was Mr. Moses present at the time Mr. Clark approached you?

A. Yes, Mr. Moses was in the court room.

Q. How far away was Mr. Moses from you?

A. I don't know. I didn't look around where Moses was.

Q. You state that you called Mr. Moses to take

(Testimony of Otto F. Heine.)

charge of Mr. Clark and allow him to make a 'phone call; is that correct? A. What?

Q. What were your instructions to Mr. Moses with [8] reference to Mr. Clark?

A. I told Deputy Moses to accompany Mr. Herbert Clark to my office to telephone the garage about his automobile.

Q. You didn't authorize him to allow Mr. Clark to make any other calls?

A. No, I did not authorize him. I didn't know he was going to make any other calls.

Q. You don't know from your own knowledge that he did make any other calls, do you?

A. I do not.

Q. Do you know from your own knowledge whether he made any calls?

A. I saw him use the 'phone.

Q. You saw him use the 'phone. Where did you see him?

A. From the door here, the court room door.

Q. And Mr. Clark, you stated, was in your office?

A. Mr. Clark was in my office, together with Deputy Emanuel Moses, Jr., and my chief deputy, Thomas R. Clark.

Q. Did you consult the Court before you authorized Mr. Moses to take charge of Mr. Clark and allow him to make a 'phone call?

A. I did not, Mr. Ahrens.

Q. Did you consult the Court with reference to Mr. Clark at any time?

(Testimony of Otto F. Heine.)

A. I did not, sir. [9]

Q. Could you give us the usual practice——

Mr. Ahrens: Withdraw the question. That is all.

Cross-Examination

By Mr. Hoddick:

Q. One moment, Mr. Heine.

A. Pardon me?

Q. Has it been customary before a jury retires, for purposes of deliberation, to permit members of that jury to make calls to their families and advise them that they might not be home for supper?

Mr. Ahrens: I object, your Honor. That is immaterial. It has nothing to do with the case, what the usual practice is. It is what the Court instructed the Marshal to do in this case that counts. It is not what the usual practice or former instructions of the Court were.

The Court. Sustained.

Mr. Hoddick: Will your Honor hear me on that point, please.

The Court: All right. I will withdraw the ruling.

Mr. Hoddick: The question here is, basically, whether the act of the juror prejudiced the defendant in any manner, and there is a presumption that where a juror talks with a third party, that that conversation might have been prejudicial if it had a bearing on the case.

(Testimony of Otto F. Heine.)

Now, if we have in this court a practice of permitting [10] jurors to call their families to send personal messages in contemplation of the fact that they might be locked up here or kept together for an extended period of time: "I won't be home in time for dinner," or "Please don't lock the door to my garage; I want to get the car," if that has been the practice, I think it lends weight to the fact that that type of message has long been considered permissible by this Court and not being prejudicial to the defendant. It also lends to Mr. Heine or Mr. Moses authority to permit such calls to be made without in each instance having to go to the Court. In other words, if Mr. Heine on previous occasions has gone to his Honor sometime in the past and has said that so-and-so juror wants to call his family and tell them he may not be home for supper, and the Court says, "OK, make that telephone call," and if that is done over an extended period of time, it is only natural Mr. Heine or Mr. Moses would permit jurors to make such telephone calls so long as the conversation did not relate to the case.

Mr. Ahrens: Your Honor, it is the principle of the thing in this case that counts. The Court specifically instructed the Marshal as to what he was to do, and the Marshal possibly could have gone about it in another method. Certainly he should have consulted the Court before he allowed the juror to make the call. He could also have taken a message or relayed a message, gone to the

(Testimony of Otto F. Heine.)

'phone or had one of [11] his deputies go to the 'phone and make a call, rather than allow the juror personally to go and make the telephone call. And further, we don't have any indication as to what the conversation was. It is immaterial as far as the issue is concerned at present.

Mr. Hoddick: Your Honor, I don't think the subject matter of the conversation is immaterial.

Mr. Ahrens: At this time.

Mr. Hoddick: All the cases go to the question as to whether the conversation has some direct bearing on the case.

The Court: The point is that at this time we don't know what it was from this witness.

Mr. Hoddick: That may be, but here we have the Marshal, who has been charged with the custody of the jury, and you have the conversation with the juror and the juror telling him, "I want to make a call" for a certain purpose having no connection with the case. The question is whether the Marshal had perhaps—I don't think that that bears on whether this is grounds for a new trial or not, but the immediate question here is whether the Marshal had an implied authority to permit that juror to make a call.

Mr. Ahrens: It is the conduct we are interested in here. The conduct, we contend, is highly prejudicial. The possibilities of abuse would be so great if this practice were [12] to be extensively permitted, to allow jurors to go to the 'phone. Here the orders were specifically given by the

(Testimony of Otto F. Heine.)

Court and we contend that any variation or deviation in that conduct is prejudicial in itself. As far as the conversation of the 'phone call is concerned, Mr. Heine has testified he knows nothing about it, and at this point it is immaterial.

There is the further question that arises as to whether or not the Court is at liberty to authorize a 'phone call of a minor nature such as this.

The Court: I am going to overrule the objection. All right, go ahead.

Mr. Hoddick: Will you read the question.

The Reporter (Reading); "Q. Has it been customary before a jury retires, for purposes of deliberation, to permit members of that jury to make calls to their families and advise them that they might not be home for supper?"

A. In answer to that question, I would state it is not customary, but generally some of the jurors want to telephone their wives that they will not be home for supper and probably may be locked up. I remember a few occasions I allowed that. Then when the jury is locked up over night I would state that it was customary that the jurors, they want to get their pajamas, they telephone home; they want their wives to bring their pajamas. Some of them can't sleep. [13] without pajamas, so I let the jurors call their wives.

Mr. Ahrens: I request the last part of the answer be stricken. He testified it was not customary. It is unresponsive. The testimony speaks for itself.

(Testimony of Otto F. Heine.)

The Court: I originally sustained the objection on the ground we weren't interested in calls for pajamas and calls for purposes of saying they wouldn't be home for supper. That was my basic thought, that that was not the issue here. However, on your other point, that this answer "blows hot and cold," I agree with you, but I will let it stand and speak for itself.

Mr. Ahrens: May I note an exception for the record?

The Court: Yes.

Q. (By Mr. Hoddick): Mr. Heine, if, in the past, a juror had shown you that he found it necessary to make a telephone call to discuss something entirely apart from the case with a third party, it has been the practice, has it not, to send him in the custody of a deputy marshal and permit him to make the call?

Mr. Ahrens: Objected to as asked and answered. He testified as to the custom.

The Court: I think so.

Q. (By Mr. Hoddick): Were you standing out in the hallway, Mr. Heine, when you saw Mr. Clark make this 'phone call in the presence of Mr. Moses and your chief deputy? [14]

A. Yes. When he asked me to go to my office and telephone, I went by the door, and the other eleven jurors were in the court room. I looked out to see he went direct to my office in company with Deputy Moses, and when I looked out in the hallway, my chief deputy, Thomas Clark, was sitting

(Testimony of Otto F. Heine.)

there, too. I thought that was sufficient for them to look out what was going on.

Q. When you looked down the hallway, Mr. Heine, did you see Mr. Miho anywhere? Did you notice him?

A. Yes, I saw the two attorneys, Mr. Miho and Mr. Ahrens, standing out on my right, saw them go down.

Q. Were they looking the same direction you were? A. Apparently.

Mr. Miho: Can you say whether I saw you or not?

The Witness: That I can't tell. I know both of you were standing outside there. Whether you saw me or not, that is up to you. I don't know.

Mr. Ahrens: Were we facing you?

The Witness: You were facing me, Mr. Ahrens.

Mr. Ahrens: I was?

The Witness: Yes, sir.

Mr. Ahrens: How far away was I?

The Witness: You were about 20 feet away, I surmise.

Mr. Ahrens: Are there some pillars that might have [15] been in the way?

The Witness: I beg your pardon?

Mr. Hoddick: I am sorry, Mr. Ahrens. This is cross-examination.

Mr. Ahrens: I am sorry.

Q. (By Mr. Hoddick): Mr. Heine, have you ever at any time since you were appointed as United States Marshal for the District of Hawaii

(Testimony of Otto F. Heine.)

requested permission of the Court to permit a juror to make a telephone call of this nature?

A. I don't believe I have.

Mr. Ahrens: Objected to, your Honor, as being immaterial.

The Court: That wouldn't prove whether it was right or wrong. It relates to your point of custom, however. I think the objection is good.

Mr. Hoddick: I just want to show there is no deliberate misuse of authority.

Mr. Ahrens: I will stipulate there is no deliberate malignant misuse of authority.

Mr. Hoddick: That is all.

The Court: Mr. Ahrens.

Redirect Examination

By Mr. Ahrens:

Q. Mr. Heine, how far away is your office from the door of the court room, how many feet?

A. Oh, I guess it is about 80 feet, probably a little more.

Q. You are sure that you saw Mr. Clark and Mr. Moses inside of your office?

A. Very positive.

The Court: Which Mr. Clark? There are two Clarks.

The Witness: Two Clarks.

The Court. Deputy Clark or Juror Clark?

Mr. Ahrens: Juror.

The Witness: The juror, yes.

(Testimony of Otto F. Heine.)

Mr. Hoddick: Objection, your Honor, on the grounds that this is his own witness.

The Court: Technically, but go ahead.

Mr. Ahrens: That is all.

The Court: Go ahead. You are not cross-examining him. You sound as if you were, but go ahead. This is redirect.

Q. (By Mr. Ahrens). Is there a counter in the office, in your office?

A. A counter in my private office?

Q. Yes. A. No, sir.

Q. No counter in your private office?

A. None whatever. There is two desks there.

Q. Are they facing the door or facing the outside? [17]

A. If I swivel my chair, my folding desk; and I turn around, my top desk.

Q. Where is the telephone, Mr. Heine?

A. On my top desk, facing the street.

Q. What was the position of Deputy Clark?

A. He was sitting on the right of my office as you go in towards the wall.

Q. How large is your office, Mr. Heine?

A. My office, I would state, is about 18 by 12.

Q. You can see, then, through the doorway the position, without too much trouble, of people there from a vantage point right outside the door; is that correct?

A. Yes, with the door open.

The Court: Was the door open?

The Witness: It was.

(Testimony of Otto F. Heine.)

The Court: All of the time?

The Witness: All of the time.

Q. (By Mr. Ahrens): Did you see anybody use the telephone?

A. All of the time that afternoon.

Q. Did you see anyone use the telephone?

A. Beg pardon?

Q. Did you see anyone use the telephone?

A. No, I don't think I observed anybody use the 'phone. Probably might have been the juror. I might have saw Mr. [18] Herbert Clark. I saw somebody at the 'phone.

Q. How long was it before Mr. Moses and the juror returned to the court room

A. I should say—judge about two minutes, maybe a little longer.

Q. It might have been five minutes?

A. I doubt it.

Q. Could have been?

A. I don't think it was five minutes.

Q. Did Deputy Clarke come back?

The Court: Deputy Clarke had never been here.

The Witness: Deputy Clarke was never in the court room that day, was not in the court room that day.

Q. (By Mr. Ahrens): Did he stay in your office? You stated Mr. Clark, the juror, and Deputy Clarke, is that correct, were in your office at the time the juror made the telephone call?

A. That is correct.

(Testimony of Otto F. Heine.)

The Court: And Deputy Moses.

The Witness: And Deputy Moses, too.

Mr. Ahrens: And Deputy Moses.

Q. (By Mr. Ahrens): Did Deputy Clark leave your office, so far as you know, at any time around, before or after the 'phone call was made?

A. All that I recollect when I saw Mr.—when I watched [19] Mr. Clark go down to my office in company of Deputy Moses, my chief deputy, Thomas R. Clark, was sitting on a chair at the right, and I beleive he stayed there until the conversation was over.

Q. And you authorized Deputy Moses to allow Mr. Clark to make one 'phone call to his garage; is that correct?

A. To make one 'phone call.

Q. To make one 'phone call concerning his car at a garage? A. I did.

Q. 'Phone a garage? A. Yes, sir.

Q. That is the only call you authorized?

A. Well, he asked me—Mr. Herbert Clark asked me if he could make a 'phone call to his garage, and I said to him, "Certainly." And I instructed Deputy Emanuel Moses to accompany him to the 'phone.

Q. That is the only call you authorized?

A. That is the only 'phone call I authorized.

Mr. Ahrens: Thank you, Mr. Heine. That is all.

(Testimony of Otto F. Heine.)

Recross-Examination

By Mr. Hoddick:

Q. Mr. Heine, is it necessary for one of your deputy marshals to ask your permission, if he has been charged also with the custody of a juror, to make a 'phone call of this [20] sort or not?

A. No, they know it. I don't have to instruct them; as long as they have been sworn in court, I thought it was all right.

The Court: Mr. Heine——

The Witness: Yes, your Honor.

The Court: How did the jury happen to be in the court room, and how did you happen to be in the court room with the jury on this occasion?

The Witness: When I was sworn in, I always make it a practice, I look and see the door is locked leading into the court room.

The Court: Why? Is this the jury room?

The Witness: No, the court room.

The Court: What I am trying to have you explain is, after the Court retired to allow the jury to deliberate, how the jury happened to remain in the court room.

The Witness: In this court room?

The Court: Why weren't they up in the jury room?

The Witness: Because you gave orders they may deliberate in this court room.

The Court: All right. What were you doing in the court room?

(Testimony of Otto F. Heine.)

The Witness: I was there to see everything was O.K., to see all the jurors were present; and as soon as they [21] all got here, twelve of them, I vacated and shut the door. Moses stood watch outside and I up and down.

The Court: At the time you allowed Juror Clark to make a telephone call, had the jury settled down and were all the doors arranged and windows arranged so they could proceed to deliberate?

The Witness: No, sir, they were not.

The Court: You hadn't locked the jury up?

The Witness: I hadn't. I hadn't locked the jury up.

The Court: When did you lock the jury up?

The Witness: I locked the jury up when Mr. Herbert Clark came in. I don't lock any jury up until the twelve jurors are present.

The Court: When did you next unlock the doors of the jury room?

The Witness: I went to see you about taking the jurors to supper that evening, and I think it was about five minutes of six when I knocked at the door, and one of the jurors came out, and I asked him if they wanted to go to lunch. He said they would like to take another ballot, and that ballot, I think, took a little while, maybe a few minutes after six when they again knocked at the door and said they had arrived at a verdict.

The Court: Other than those two instances of communication between you and the jury, after the

(Testimony of Otto F. Heine.)

time they were locked up, did any juror leave the court room, which was serving as the jury room?

The Witness: Not one of them.

The Court: Did anyone communicate with any one of the jurors after they were locked up, other than as you have outlined?

The Witness: No, sir.

The Court: All right. Based on my questions, you each can ask questions.

Redirect Examination

By Mr. Ahrens:

Q. Didn't you talk to some of the jurors before Mr. Clark returned, before they were locked up, just before they settled down, while you were in the room here?

A. I talked to some of the jurors. I just asked them—I told them where the toilet was, they could wash their hands and things like that, which they didn't know anything about. I had to tell them where to go in case they wanted to go to the toilet or wash their hands. I didn't speak to them anything pertaining to the case whatsoever.

Q. What else did you talk to them about before they settled down, Mr. Heine?

A. I told you what I talked to them.

Q. Could you be more specific [23]

A. I could be more specific by telling you where the toilet was.

The Court: Where is it, incidently?

(Testimony of Otto F. Heine.)

The Witness: Right over here (indicating).

The Court: In other words, when we use this court room as a jury room, due to the deplorable condition of the jury room, the Court makes its private lavatory available to the jury and you lock the door into my chambers?

The Witness: The Court makes his private toilet available to the jurors, and I locked the door to the Judge's Chambers from the court room. The key is in my possession.

Q. (By Mr. Ahrens): While Mr. Clark was out making this 'phone call and before the jurors had settled down, you were still here in the room part of the time, weren't you? A. I was.

Q. What was your answer again?

A. Beg pardon?

Q. What was the answer to that last question?

A. I was. I was here for the purpose—I explained I was here for the purpose of allowing——

Q. You have explained that.

A. (Continuing): ——no one to come in and talk to the jurors, the eleven jurors.

The Court: Any further questions?

Q. (By Mr. Ahrens): Then when did you leave the jury [24] room? You were in and out?

A. As soon as the jury was ready to deliberate, I told them anything they wanted to knock at the door and I would answer it, if they wanted any information.

Q. That was after Mr. Clark came back?

A. That was.

(Testimony of Otto F. Heine.)

Q. And then you went out of the jury room and locked them in? A. I did.

The Court: Where was Mr. Moses?

The Witness: Mr. Moses was outside. He went out with me, rather.

Q. (By Mr. Ahrens): Did Moses come into the jury room with Clark after he came back from the 'phone call? A. He did.

Q. Did he talk to anybody at that time?

A. Not to my recollection.

Q. Was he talking to Mr. Clark as he walked into the jury room?

A. I don't know. I was too far away. I was over here at the time (indicating).

Q. You were over here (indicating)?

A. Over on my left.

Q. What were you doing when you were over there? When Mr. Clark and Mr. Moses came in, you were here; what [25] were you doing at that particular time? A. I was standing there.

Q. Where was the rest of the jury?

A. They were standing around.

Q. Talking?

A. Well, talking, I guess. I don't know what they were talking about. It had nothing to do with me what they were talking about.

Q. Did Mr. Clark, the juror, talk to or ask any questions of any of the jurors while you were in the room? A. He did not.

Q. Did any of the jurors ask you any questions

(Testimony of Otto F. Heine.)

or talk to you, approach you, other than Mr. Clark?

A. About what?

Q. Anything. Discuss the weather maybe.

A. They did not.

Q. None of them approached you at any time before the 'phone call——

Mr. Ahrens: Withdraw that question.

The Court: Wait a minute. The only basis in your motion is this 'phone call. Let's not waste a lot of time going into other things that you are not charging as error. The whole basis of the motion on this point is the 'phone call; unless you are testing the credibility.

Mr. Ahrens: No. Later on, if it develops, your Honor, I would like to amend our motion.

The Court: I am not going to allow this to develop into a searching expedition. You have had two days to talk to Mr. Heine. I told you to talk to him the other day.

Mr. Ahrens: All right, your Honor. I am sorry. Mr. Heine, thank you; that is all.

The Witness: Thank you.

(Witness excused.)

The Court: All right, next witness. You can still talk to him and if you find something wrong, come back, but let's get this matter in hand attended to.

EMANUEL MOSES, JR.

called as a witness by the attorney for Defendant, being first duly sworn, was examined and testified as follows:

The Court: You are Emanuel Moses, Jr.

The Witness: Yes, sir.

The Court: You are Deputy United States Marshal?

The Witness: Yes, sir.

The Court: How old are you?

The Witness: Forty-one.

The Court: And you reside here in Honolulu?

The Witness: Yes.

The Court: You are a citizen of the United States exclusively?

The Witness: Yes, sir. [27]

The Court: Take the witness.

Direct Examination

By Mr. Ahrens:

Q. Mr. Moses, on Decemer 14 of this year were you instructed by the Court in Criminal No. 10,256 to take charge of the jury during their deliberation?

A. I was.

Q. Was anybody else also authorized or co-authorized to so take care of the jury?

A. Marshal Heine, Otto Heine.

Q. And what were your instructions from the Court as to your conduct with the jury and conduct with outsiders?

(Testimony of Emanuel Moses, Jr.)

A. Not to let them converse with anybody except to the Marshal and myself.

Q. Were you told not to allow anyone else to converse with them? A. Yes.

Q. When you and Mr. Heine were in the process of clearing the court room, did you have occasion to speak to any juror or did any juror have occasion to speak to you? A. No, sir.

Q. When the court room was completely cleared, did Marshal Heine give you any instructions?

A. I was having the table, two tables set together and moving some chairs when he called me and told me to take this [28] juror to the office, he wanted to call his garage in regard to his car.

Q. At that time was everybody out of this room except the jury, you and Mr. Heine?

A. Yes, everybody out of the court room except the jurors and Mr. Heine and myself.

Q. Where was Mr. Heine about the time he called you?

A. Mr. Heine was about here somewheres (indicating).

Q. And you were moving these two tables?

A. Yes, I was way down at that corner there.

Q. You were at the end? A. Yes.

Q. Was Mr. Heine talking to any of the jurors? A. That I wouldn't know.

Q. When Mr. Heine called you over, who was there besides Mr. Heine?

A. When he called me, he was about here (indi-

(Testimony of Emanuel Moses, Jr.)

cating) and I was there (indicating). He just called me to take this juror to the office to use the 'phone.

Q. Who was there besides Mr. Heine? Was Mr. Clark there, the juror?

A. Must have been. He pointed to a juror there, said, "Take this juror to the office."

Q. He pointed to Mr. Clark? A. Yes. [29]

Q. Where were the rest of the jurors?

A. They were all moving around, taking their coats off. Some of them were helping with chairs, too.

Q. They were fairly close to where Mr. Heine and Mr. Clark were?

A. They were all around. I couldn't say how close they were.

Q. They were helping both you and Mr. Heine set up the room for their deliberations?

A. Yes.

Q. There was occasional talk going on at the time among yourselves and the jurors?

A. Not myself. Maybe among the jurors.

Q. Oh, I see. What were your specific—
Mr. Ahrens: Withdraw that.

Q. (By Mr. Ahrens): Did you overhear any particular conversation between anybody in the jury room? A. No.

What were your instructions from Mr. Heine after he called you over? Will you give them to us as exactly as you can rememer.

(Testimony of Emanuel Moses, Jr.)

A. I just remember he pointed to a juror there and said, "Take this juror. I want him to use the office—to our office to use the 'phone."

Q. He said, "Take him to the office"? [30]

A. Yes, our office.

Q. "He wants to use the 'phone.'"

A. Yes, to call the garage in regard to his car.

Q. He did mention something about a car?

A. Something about that.

Q. You didn't hear the actual conversation between Mr. Clark and Mr. Heine?

A. No. No, I did not.

Q. Do you know who he was supposed to call or who he wanted to call?

A. Well, he just mentioned about the car, the garage and car. That is about all.

Q. You didn't know what the name of the garage was? A. No, I did not?

Q. Did Mr. Heine say anything more?

A. No.

Q. He did not mention allowing you or authorizing you to let Mr. Clark make any other calls?

A. No.

Q. You accompanied Mr. Clark out of the court room then; is that correct? A. Yes, sir.

Q. Was anybody else present? A. No, sir.

Q. Just the two of you? [31]

A. Just the two of us.

Q. Where did you go?

A. Went directly to the office.

(Testimony of Emanuel Moses, Jr.)

Q. Did you talk on the way? A. No, sir.

Q. What happened—Who was there when you got to the office?

A. Our chief deputy, Mr. Clark.

Q. Did you talk to him? A. No.

Q. Did Juror Clark talk to Deputy Clark?

A. No, not that I know of.

Q. At any time?

A. He talked after he used the 'phone.

Q. What happened when you got to the office? There were three of you then and what happened?

A. Mr. Clark got on the 'phone.

Q. He didn't talk to anybody?

A. No, he went to the 'phone and called the number he was calling.

Q. Called some number?

A. Must have been the garage because he was talking about a car. He said he couldn't get there in time for his car, it would be closed, so the proprietor or somebody would bring the car to the Federal Building. [32]

Q. You heard him say that? A. Yes.

Q. You don't know who he called?

A. No, I don't know.

Q. You just heard part of the conversation, not the complete conversation.

A. Well, mostly what Mr. Clark was saying over the 'phone.

Q. No, I mean, were you talking to Deputy Clark while Juror Clark was 'phoning?

(Testimony of Emanuel Moses, Jr.)

A. No, I was not talking.

Q. Not at all? A. No.

Q. How far away were you from Mr. Clark at the time he made this 'phone call?

A. About two feet, two and a half feet, right back of him.

Q. Standing? Sitting? A. Standing.

Q. Where was Deputy Clark?

A. Sitting on the side of the 'phone.

Q. Sitting on the side. You didn't authorize Mr. Clark to make any other 'phone call, did you?

A. No, sir.

Q. Did he make any other call? [33]

A. He did.

Q. How many? A. One.

Q. To whom? A. To his home.

Q. Was there an answer?

A. Got an answer from a child or somebody in the home.

Q. Do you know whom he got an answer from?

A. I know he did.

Q. Of your own knowledge? A. Yes.

Q. How do you know that?

A. Well, somebody answered the 'phone and he asked for Mother, and the child, or somebody—the mother was way in the back, and he said, "Tell Mother I won't be home early this evening."

Q. What you heard is that Juror Clark said, "Tell Mother I won't be home early"?

A. Yes.

(Testimony of Emanuel Moses, Jr.)

Q. That might have been Mr. Clark's mother that he was referring to, you don't know?

A. Well, I couldn't say. I had the impression it was his wife.

The Court: More than likely his wife.

Q. (By Mr. Ahrens): What else did Mr. Clark say? [34]

A. That is about all. A child on the 'phone anyway.

Q. But he said a little more?

A. He might have. I couldn't recall.

Q. Did Deputy Clark authorize any 'phone calls that you know of? A. No.

Q. What were you doing when Juror Clark finished his first 'phone call?

A. Standing right back of him.

Q. What was Deputy Clark doing?

A. Sitting right alongside of him.

Q. Did you talk to him after he finished his first 'phone call? A. No, sir.

Q. Were you going to take him directly back?

A. Just as soon as he finished his first call, he grabbed the 'phone and said, "I think I better call my home."

Q. Your instructions from Mr. Heine were to allow him to make one call to a garage; is that right? A. Yes.

Q. So you knew you should have taken him back to this room immediately after that call; is that right? A. Yes.

(Testimony of Emanuel Moses, Jr.)

Q. And actually you didn't do that?

A. Well, before I had a change to move, he dialed the [35] 'phone again.

Q. You didn't try to stop him?

A. I told him—when he dialed home, I told him to make it snappy, the only thing I told him.

Mr. Ahrens: That is all. Thank you.

The Court: Cross-examination.

Cross-Examination

By Mr. Hoddick:

Q. On either of these telephone conversations did you hear Mr. Clark say anything pertaining to the subject matter of this case?

A. No, sir.

Mr. Hoddick: No further questions.

Mr. Ahrens: But there were some parts of the conversation that you might have missed?

The Witness: I might have.

Mr. Ahrens: That is all.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Ahrens. Mr. Clark, please.

THOMAS R. CLARK

called as a witness by attorney for the Defendant, being first duly sworn, was examined and testified as follows:

The Court. You are Thomas R. Clark? [36]

The Witness: Yes, I am.

The Court: "R" is the middle initial?

The Witness: That's right.

The Court: You are Chief Deputy United States Marshal for this district?

The Witness: Yes, sir.

The Court: Your age is?

The Witness: Fifty.

The Court: You are a resident of Honolulu?

The Witness: Yes, I am.

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: Yes, sir.

Direct Examination

By Mr. Ahrens:

Q. Mr. Clark, do you recall where you were on December 14, 1949, at about 4:20?

A. The date I am not sure of, but I think it is that date, December 14, 19—I think it was Wednesday. Yes.

Q. Where were you?

A. I was in Mr. Heine's office. That is Room 304, on the south end of the Federal Building.

(Testimony of Thomas R. Clark.)

Q. That was the day this year that the Jury was deliberating on Criminal Case No. 10,256? [37]

A. Yes, that is right, if that was the 14th.

Q. You were in Mr. Heine's office?

A. That is right.

Q. What were you doing in Mr. Heine's office?

A. Well, it was getting near quitting time, and I didn't know whether I should go or wait for orders from Mr. Heine. That's why I went to his office. I think it was getting around 4:30 p.m.

Q. 4:30. Were you sitting, standing, working; just what were you doing, more or less waiting for instructions?

A. That is right. I was just sitting in Mr. Heine's office.

Q. In Mr. Heine's office?

A. That's right.

Q. Where in the office were you, Mr. Clark?

A. In the south end of the Federal Building here, Room 304.

Q. What I mean, Mr. Clark, I am sorry, is, at what desk or what chair in the room were you sitting?

A. Well, we will say on a chair facing north, right out of Mr. Heine's room where the whole corridor is visible to me.

Q. So you could see straight down the corridor?

A. That's right.

Q. What did you observe, if anything, when you looked [38] down the corridor about that time?

A. Well, the first thing that attracted my at-

(Testimony of Thomas R. Clark.)

tention was when Deputy Moses came into the room with someone.

Q. He came right into the room; that is the first time you noticed Deputy Moses?

A. That's right.

Q. Who was he with?

A. Well, at the time I did not know who it was.

Q. Do you know who it was now?

A. I have heard he was a juror.

Q. Do you know his name?

A. Yes, his name was Clark, like mine. I remembered that.

The Court: Any relation?

The Witness: No, none whatever.

Q. (By Mr. Ahrens): What happened when Mr. Moses came in the door? He came in first, you said?

A. I think he did, followed by Deputy Moses, yes.

Q. Followed right after by Mr. Moses?

A. Yes.

Q. Did Mr. Moses say anything to you when he walked in the door?

A. No, I don't think he said anything, but they proceeded right to the telephone and the juror began dialing a number. [39]

Q. What were they talking about as they entered the door?

A. What were they talking about as they entered the door?

(Testimony of Thomas R. Clark.)

Q. Mr. Clark and Mr. Moses. What were they talking about as they entered the door?

A. I do not know. I think they were conversing, but I couldn't say; I haven't the slightest idea what they were talking about.

Q. Mr. Moses went directly to the 'phone?

A. No, I think the juror did. In fact, I know the juror did.

Q. What did Mr. Moses do? Where did he go?

A. Just stood on another desk, facing me.

Q. I see. So when Mr. Clark passed you, did he say anything to you on his way to the telephone?

A. No, he just proceeded to dial a number.

Q. Directly to the 'phone and dialed a number?

A. That's right.

Q. Did anybody tell him how to use the telephone? A. No.

Q. No conversation? A. No.

Q. Do you have to dial—Can you dial your number right away or do you have to dial the operator first? [40]

A. You dial a zero out of that office and you get Bell Telephone and you dial your number.

Q. There was no mention made of how to operate the telephone?

A. I don't know. I couldn't say. I do not remember.

Q. Do you recall if he had difficulty getting his number, or did he get it right away? Did he know how to use the 'phone? He didn't have any trouble?

(Testimony of Thomas R. Clark.)

A. I don't know that. I don't recall that, whether he had difficulty getting the number or not. I don't know.

Q. How long would you say it took him to start talking on the 'phone after you first heard him start clicking the little dial?

A. Right away I think.

Q. Right away? A. Yes.

Q. It was a normal 'phone call?

A. Yes, yes, that is right.

Q. There was no trouble?

A. Apparently not.

Q. It went through right away. Did you hear Mr. Clark say anything over the telephone?

A. Part of the conversation I did hear, yes.

Q. You heard part of it. You heard part of what Mr. Clark said? [41]

A. Yes, the discussion over the telephone was primarily over the key of his automobile.

Q. A key? A. The key.

Q. Do you know who he called?

A. No, I don't.

Q. He didn't mention anybody by name on the telephone? He didn't say "Joe"?

A. If he did, I don't recall.

Q. He mentioned something about a key. What else did he mention that you know of?

A. The conversation was about to bring his car up first, and apparently the one on the other end said they can do that there.

Q. You are just guessing; you don't know what

(Testimony of Thomas R. Clark.)

the person on the other end said; you didn't hear?

A. No, I can't. No, I did not hear that.

Q. Just tell us what you know.

A. Then the conversation drifted into where they should put this key, whether on the floor board or some place on the car so he could find it later.

Q. They were pre-arranging a place to put the key?

A. On this car, yes.

Q. I see. A. That's right. [42]

Q. What was Mr. Clark's reason, or did you hear him give a reason, to whoever he was talking to, for not getting the car?

A. No, I don't recall him saying—giving the other person his reason for not getting the car. If he did give, I don't think I——

Q. You didn't hear it. There was part of the conversation, as you stated before, you didn't hear?

A. Part of it, yes, because I didn't want to be butting in and listening to other people's conversations.

Q. I am referring to what Mr. Clark himself said.

A. That's right.

Q. Did you at any time leave the room while Mr. Clark was 'phoning?

A. No, I did not.

Q. Did you hear Mr. Clark mention anything——

Mr. Ahrens: Withdraw that question.

A. I know——

The Court: Wait a minute. There is no question.

(Testimony of Thomas R. Clark.)

Q. (By Mr. Ahrens): Didn't you hear Mr. Clark mention something to the effect that he was going to be locked up in the jury room?

A. If he did, I did not hear him say.

Q. About how long did this 'phone call last?

A. Three minutes, four minutes, perhaps. [43]

Q. Three or four or five minutes, maybe seven?

A. Seven minutes is an awful long time. I don't think——

Q. Probably closer to five, you would say?

A. Yes.

Q. But it was a long conversation?

A. He put in another call, too.

Q. No, just answer my question. This first 'phone call I am talking about; it was a fairly long conversation?

A. I don't know whether I would say it was a very long conversation.

Q. I say fairly long.

A. Yes, we will say fairly long.

Q. It was not curt, short? A. No.

Q. Rather informal? A. Yes.

The Court: What is a formal telephone call? Go ahead.

Q. (By Mr. Ahrens): When he got through making his 'phone call, where were you?

A. I was sitting right at the desk where I sat when he first come in.

Q. Where was Mr. Moses?

A. He was at another desk nearer the door facing me [44] and Mr. Clark who was telephoning.

(Testimony of Thomas R. Clark.)

Q. Did anybody say anything then, right after he hung up the 'phone? Did you say anything?

A. I don't know. I don't recall.

Q. You might have, though?

A. I might have done. I don't recall.

Q. Or were you talking to Moses?

A. No, I was not talking to Moses. I was really reading a magazine.

Q. And Moses was how many feet away from Mr. Clark? A. Four feet.

Q. At the time he finished his call?

A. About the width of a desk, oh, four feet.

Q. Four feet. What did Moses do after Mr. Clark put down the 'phone the first time, after completing his call? Did he do anything or just stay there?

A. No, Mr. Clark started dialing another number. He was still at the telephone.

Q. Oh, I see. Did you try to stop Mr. Clark?

A. Did he what?

Q. Did you try to stop Mr. Clark from making a 'phone call? A. No.

Q. Did Mr. Moses try to stop Mr. Clark from making the 'phone call? [45]

A. I don't think so.

Q. Did you hear Mr. Moses say anything to Mr. Clark when he started to dial the number or after he had dialed it?

A. After he had dialed the second number, someone from the hallway, which the view was

(Testimony of Thomas R. Clark.)

obstructed, I think hollered, "Come on in," or something to that effect.

Q. Somebody down the hall?

A. Either that or come up to the door and said, "You are wanted," or something to that effect.

Q. Said who was wanted? A. The juror.

Q. This person was talking to the juror as he was on the 'phone?

A. No, talked to Moses.

Q. Talked to Moses?

A. Whether it was Mr. Heine himself I couldn't say. Mr. Clark was on the telephone.

Q. Was he making the second call?

A. He had dialed the second call and waiting for an answer. Then they had to leave and Mr. Clark handed the telephone over to me and said, "Will you answer this telephone?" And I said, "Well, who will I be talking to?"

Q. Go ahead.

A. And then he said, "Mrs. Clark will be answering the telephone." He said, "Mrs. Clark, and just tell her that I [46] will be late." And they rushed off, and finally I picked up the telephone,—well, he handed it to me—and waited until some female voice answered on the other end and asked if it was Mr. Clark. And I told her who I was. It was the United States Marshal's office, and informed her, "Mr. Clark will be late."

Q. What else did you tell her?

A. She said something about, "Well, when he

(Testimony of Thomas R. Clark.)

is through, he can find me at the Church choir," or something like that, that she was going to choir practice, and that is where she would be.

Q. Did you convey that message to Mr. Moses or Heine or somebody? A. No.

Q. Mr. Clark learned what his wife said, didn't he?

A. Right after I hung up the telephone I wrote a little note to Mr. Clark to tell him Mrs. Clark will be at choir practice, he will find her there, something to that effect. And I delivered it—I am pretty sure I gave it to Mr. Moses himself to hand to the juror.

Q. What else did you say to Mrs. Clark when you talked to her over the 'phone, anything that you haven't mentioned to us?

A. No, I don't think, other than what I just said.

Q. Mr. Clark did talk to someone at that number before [47] he handed you the 'phone, or did he not? Did he or didn't he?

A. I don't think he had a chance to talk to anyone, because he had dialed and he was waiting for someone, so he handed it over to me and I did the waiting, and pretty soon a voice answered. Because I asked him who would I be talking to when he handed the telephone over to me, and he said, "Mrs. Clark."

Q. You don't recall his talking to anybody on the telephone the second time? He might not have

(Testimony of Thomas R. Clark.)

been talking to Mrs. Clark, but he might have been talking to somebody else, maybe his daughter, perhaps, or somebody else?

A. No, I don't think—he dialed and pretty soon he had to leave right now, and he handed the telephone over to me. I don't know whether he talked to anyone before Mrs. Clark——

Q. But he might have?

A. Well, I guess he might have. I don't know.

Q. Do you recall the conversation when that person whom you don't know came to the door and said to get going to the jury? What transpired? Somebody came and what happened? They wanted the juror, you said?

A. Yes, and Moses just——

Q. What, exactly, was done or said? You were right there.

A. Well, the person who brought the message I couldn't say, because his view was obstructed. I am sitting down and [48] Mr. Clark and Moses would be in the way towards the door. Who brought the message I couldn't say. I don't know.

Q. But it wasn't anybody from your office staff, because they were all there?

A. That I do not know, but someone. That's why Mr. Moses said, "Come on, let's go." They had to leave, and the man handed the telephone over to me.

Q. But the only people from your staff on duty that day were you, Mr. Heine, and Mr. Moses?

A. That is right.

(Testimony of Thomas R. Clark.)

Q. And did you state you knew where Mr. Heine was? Did you see him down the hall?

A. I know he was up the corridor here, this way. I knew that.

Q. I see. So the man who hollered, or did whatever was done, was not Mr. Heine?

A. That I do not know. I didn't see.

Q. Well, you would have recognized Mr. Heine's voice had it been Mr. Heine?

A. Sure, I am familiar with his voice.

Q. And if it was Mr. Heine, you would have recognized his voice, being familiar with it?

A. Well, that is possible, I could have recognized it.

Q. But you didn't recognize this voice?

A. No, I did not. [49]

Q. Can't you give us a little more detail on the exact words or actions that this person went through? You said you heard something, but there was a man in the way; you couldn't see who it was, so he must have talked then.

A. No, I couldn't see the man. I don't know who it was.

Q. Well, see if you can't remember what he said.

A. No, I don't. I don't remember. The thing that attracted my attention was Moses grabbed the juror and said, "Come on, let's go."

Q. He was not talking directly to Mr. Clark, then, if you don't recall?

A. I don't think he was talking to Mr. Clark.

Q. But he might have been?

(Testimony of Thomas R. Clark.)

A. No, I would say more likely he was talking to Moses.

Mr. Ahrens: That is all. Thank you.

Mr. Hoddick: No questions.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Ahrens: That is all.

The Court: Aren't you going to call Juror Clark.

Mr. Ahrens: No, your Honor, we are not.

The Court: Why? He is the one who made the 'phone [50] call.

Mr. Ahrens: Well, it is our contention that what actually transpired, although it is pertinent, it is no necessary that we go into it at this time, inasmuch as when something irregular, something of this nature, goes on, it is sufficient to show that there was an irregularity, an opportunity to discuss the case or anything of that nature. Then the Government, if it desires, can come in and bring Mr. Clark and show what the telephone call was all about.

The Court: But you are the one who is trying to prove something prejudicial happened. But you don't have to call him. I just expected he would be the final witness.

Mr. Ahrens: We will show he made a call.

The Court: All right, let's get going. We have spent two hours on this now. I am getting a little bit impatient. How much more have you got?

Mr. Hoddick: Your Honor, before he proceeds,

I would like to ask Mr. Moses one question I overlooked on cross-examination.

The Court. It is ten minutes past twelve. I will stop now and have Mr. Clark, the juror called to be here at 1:30 this afternoon. If nobody else will call him, I will call him, and at that time you can ask Mr. Moses an additional question.

We will take our noon recess until 1:30.

(Thereupon a recess was taken until 1:30 of the same day.)

* * *

Afternoon Session

The Court: Mr. Ahrens, at the noon recess I directed that Juror Clark be produced. I see he is now in court. There seems to be some confusion in the minds of some as to whether or not the Court should, or should not call him as a juror. I will refrain from calling him at this time. I will cause both of you to take notice that he is present. If neither of you call him, I will call him then.

Mr. Clark, will you step to the Marshal's office and make yourself comfortable until you are called.

Mr. Hoddick: Will you ask Mr. Moses to come down.

(Exit Mr. Clark.)

The Court: While we are waiting for that, will you come up with that book.

(Court and Counsel confer.)

EMANUEL MOSES, JR.

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

The Court: Do you want a moment to talk to Mr. Miho?

Mr. Ahrens: Please.

(Counsel confer.)

The Court: Mr. Hoddick, as I recall, has recalled Mr. Moses for one or two questions. [52]

Mr. Hoddick: That is correct.

The Court: All right, you may cross-examine further.

Cross-Examination
(Continued)

By Mr. Hoddick:

Q. Mr. Moses, when you walked out of the court room with Mr. Herbert Clark for the purpose of having him make a telephone call in Mr. Heine's office, did you see Mr. Miho in the hallway?

A. No.

Q. You did not? A. No.

Q. When you were in Mr. Heine's office and Mr. Clark was making a telephone call, do you remember seeing Mr. Miho? A. No.

Mr. Hoddick: No further questions.

Mr. Miho: I didn't know I was on trial, if your Honor please.

Mr. Ahrens: No questions.

The Court: Do you have any additional witnesses?

Mr. Ahrens: No additional witnesses, your Honor. We would like to continue the argument, however.

The Court: Let's finish up this point.

Mr. Hoddick: Your Honor, I would like to call Mr. Clark to take the stand. [53]

HERBERT A. CLARK

called as a witness by attorney for the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: Herbert A. Clark.

The Court: Age?

The Witness: Thirty-three.

The Court: Residence?

The Witness: Honolulu.

The Court: Occupation?

The Witness: Salesman.

The Court: Employed by?

The Witness: Ault Supply Company.

The Court: Citizenship?

The Witness: United States.

The Court: United States exclusively?

The Witness: Yes, sir.

The Court: Before we proceed further, let me advise you that, having been one of the twelve jurors who sat on the trial of this case, you are going to be asked some questions by the attorneys. Under no circumstances will I allow you to testify

(Testimony of Herbert A. Clark.)

to anything that occurred in the jury room after the jury was locked up and started its deliberations upon the verdict which was returned. Is that clear?

The Witness: Yes, sir.

The Court: All right. [54]

Direct Examination

By Mr. Hoddick:

Q. Mr. Clark, were you a member of the jury in the case of United States vs. Orestus Cavness?

A. Yes, sir.

Q. And after Counsel had finished their arguments, after the jury had received its instructions from the Judge, did you have occasion to make any telephone calls? A. Yes, sir.

Q. Will you describe to the Court and to me under what circumstances those calls were made, whom you called and what was said.

A. Yes, sir.

The Court: Let's first find out whether that which you are asking him about did or did not occur before or after the jury settled down and was locked up and started its deliberations.

Q. (By Mr. Hoddick): Were these telephone calls made, Mr. Clark, before or after the jury had started to deliberate about this case?

A. Before.

Q. There had been no steps taken to procure the help of a foreman before you made the telephone calls?

(Testimony of Herbert A. Clark.)

A. No steps were taken.

Q. Now, describe under what circumstances those calls [55] were made.

The Witness: May I?

The Court: Yes.

A. Not knowing how long we would be in deliberation, not having gone through this sort of thing before, I thought it would be necessary to call the Auto Service Garage where my car was parked throughout the day to ask the attendant on duty to lock my car and either bring the keys over to me or put them in a safe place where I might get them after I was through with what I was responsible for, in order that I wouldn't lose any articles that were in my car that were valuable to me.

Q. Do you know who it was you spoke to at Auto Service Garage? A. Yes, I do.

The Court: Let's start at the beginning. How did he ever get to speak to anybody at the Auto Service Garage?

Mr. Hoddick: Withdraw that last question.

Q. (By Mr. Hoddick): After making up your mind that you should call the garage to arrange for your car, what steps did you take in order to make that call?

A. When it first came to my mind that I should make the call, I believe I asked Mr. Parish, another juror, if it would be permissible for me to make a call, knowing that he had served on juries at other

(Testimony of Herbert A. Clark.)

times. And he said he thought [56] so, he was not sure. Then I spoke to the gentleman over here in the gray coat.

The Court: Peter, the bailiff.

The Witness: Yes. I asked him if some arrangements could be made where my car could be locked that was at Auto Service Garage and the keys brought to me, knowing that I could not leave; or what I could do about the same. And he said he would find out, and then I never spoke to him again about it.

The next time I brought it up was when Judge McLaughlin ordered us to come into deliberation. Is that the term? And knowing that we weren't supposed to talk to anyone, I didn't know whether to ask Marshal Heine whether I could make a 'phone call or not, but I did, and he was the next man I asked if I could make a 'phone call. And at the same time Mr. Parish asked if he could make a 'phone call, and then he decided not to make a 'phone call.

I was authorized to go to the Marshal's office and make my 'phone call, being accompanied by a Hawaiian gentleman, I don't know his name; I believe he is in the Marshal's office. And on the way down the hall he didn't say a word to me. I just mentioned that I wanted to call the garage and make arrangements for my car to be locked up, and also to call my wife, as I had an appointment to go to choir practice in our Church choir that

(Testimony of Herbert A. Clark.)

same evening, and not [57] knowing whether I could make that, I had to make other arrangements for her to get transportation to the Church.

I went in. I tried the Auto Service number three to four times.

Mr. Hoddick: Excuse me. One question.

Q. (By Mr. Hoddick): When you asked Mr. Piena, who was sitting over at the desk here, the bailiff——

The Court: Peter.

Mr. Hoddick: Peter.

The Court: I can never remember his last name. Piena, is it?

Mr. Hoddick: Piena.

Q. (By Mr. Hoddick): You asked Peter Piena whether it was right to make the telephone call; how long was that, if you remember, before you asked Marshal Heine whether you could make the call?

A. Oh, just a matter of a few minutes. It was when we were asked to step out before we were brought back into this court room.

Q. You asked him when you were told to step out? A. Yes, sir.

Q. That is when you asked Peter?

A. Yes.

Q. And you asked Mr. Heine after you came back in?

A. After we received orders to go into deliberation. [58]

(Testimony of Herbert A. Clark.)

Q. Mr. Clark, I point out to you the gentleman who has stood up there, being Moses, the United States Deputy Marshal——

Mr. Ahrens: Objection.

Q. (Continuing): And ask you if he is the man who took you down to Marshal Heine's office.

The Court: What is the nature of your objection?

Q. (Continuing): Is that the man?

A. Yes, that is the man.

Mr. Ahrens: He just told him that is the man. All he had to ask him was to identify him.

The Court: True, that is all he has to ask him, but the fact that he is the Deputy Marshal doesn't mean that is the one.

Mr. Ahrens: The witness has stated he thought the man who took him was the United States Deputy Marshal.

The Court: Overruled.

The Witness: He is the man.

The Court: He is the man. He has already testified he was the man anyhow.

The Witness: He is the man that wouldn't talk to me.

Q. (By Mr. Hoddick): You said you were walking up to the office and you were explaining to Mr. Moses about the call to the garage and the call home about the Church choir practice? [59]

A. Yes.

Q. But that he did not say anything to you?

(Testimony of Herbert A. Clark.)

A. No, he didn't.

Q. Now, will you go on. What took place right after that?

A. I sat down to make my 'phone call. He sat down in the chair opposite me, and I tried several times, not being able to get my number at the Auto Service Garage. Finally, I did make contact with Mr. Kim, who is in charge of the Auto Service operation over there—I guess he is called and termed the service station manager—came onto the 'phone, and I told him that I was still on jury duty, as I had left my car there for the days previous to this time, and he had known I was a member of the jury, and that I was tied up and I couldn't pick my car up, and I would appreciate him locking it for me and arranging to bring the keys over to me or putting them in a safe place, and he didn't want to bring the keys over to me, so he was trying to think of several different ways of locking my car and putting the keys somewhere where no one else could find them, and I could find them as readily as when I went to pick up my car. And the whole gist of the conversation was just that. I didn't tell him what I was doing, except that I was still on jury duty, and I would appreciate him locking my car, and he didn't ask me any questions. And finally he decided to lock my car and place [60] my car keys—Do you want to know where he placed them?

Q. Go ahead.

A. He placed them under the clock on the ledge

(Testimony of Herbert A. Clark.)

above the door, under the clock right above the door on top of the gas stick that he uses to measure the gas. And I thanked him very much and hung up. And I tried to call my wife, and to no avail. The 'phone was busy, and someone stuck their head out of the door and was trying to get me back up here. They were getting a little bit impatient. I was down there, to everybody's knowledge, too long. So I was getting a little nervous myself. So I asked the man Moses, I think that is his name, if he would be able to relay a message for me to my wife, and he said he would, so I gave him the number of my home, 70928, and my wife's name, and asked him to tell her that I would not be able to make choir practice and to make her own arrangements to go to choir practice herself. I did not talk to my wife at all. I didn't get my number. And I immediately left the Marshal's office and ran up to the court room. That is all.

Q. When you left the Marshal's office, had you succeeded in talking to anybody at your house?

A. No, sir.

Q. Did you give the 'phone to anybody when you went out of the Marshal's office?

A. Moses, the Hawaiian gentleman that you termed as the [61] deputy.

Q. Did anybody walk with you from the Marshal's office back to the court room?

A. Yes, someone did. I would like to retract that statement. There was another gentleman I

(Testimony of Herbert A. Clark.)

gave the 'phone number to that was sitting in the Marshal's office. I didn't give it to Moses, I am sorry. I made the wrong statement, if that is permissible.

Q. Was the other gentleman also a Hawaiian?

A. Yes.

Q. And you asked him to deliver this message?

A. Yes. Then Moses walked back with me. That is how it was. It was another Hawaiian gentleman that was sitting in the office that I asked to relay the message to my wife for me.

Q. When you asked this other Hawaiian gentleman in the office to relay the message to your wife, did you say anything to him about the subject matter of the case that was being tried here?

A. No, sir.

Q. Did he say anything to you about it?

A. No, sir.

Q. And neither you nor Mr. Kim discussed the subject matter of this case?

A. No, sir. I was merely interested in the protection [62] of my things in my car and just getting my family problem worked out as far as going to Church.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

(Testimony of Herbert A. Clark.)

Cross-Examination

By Mr. Ahrens:

Q. Mr. Clark, you mentioned that when the Court asked you to step out of the room prior to being informed that you were about to deliberate, you were wondering about a 'phone call; is that correct? A. Yes.

Q. Whom did you talk to in the corridor about making the 'phone call?

A. Peter, and I think Mr. Parish, the other jury member, it seemed he wanted to make a 'phone call, too, about his car that was in Miller & Wassman.

Q. His car was in Miller & Wassman?

A. Miller & Wassman.

Q. How did that conversation come about? Did you start it or did Mr. Parish start it?

A. I believe I started it.

Q. And you talked first to whom, if you recall?

A. I don't recall. There was just something on my mind that I thought I had better take care of.

Q. You wanted to make a 'phone call? [63]

A. Yes.

Q. Do you remember what Mr. Parish advised you? The reason you said you approached him was because you said you knew he had served on a jury before.

A. From his other statements before, yes, I had known that he was——

Q. What other questions?

A. Well, when he was questioned by Mr. Miho.

(Testimony of Herbert A. Clark.)

The Court: Hoddick.

The Witness: Mr. Hoddick, when we were being processed.

Q. (By Mr. Ahrens): Did you know Mr. Parish prior to the time that you sat on the jury?

A. Oh, yes.

Q. Are you a good friend of Mr. Parish's?

A. Oh, I have known him for a good many years. I don't associate with him personally. I know him as an employee of the Bishop Bank.

Q. Did you know that Mr. Parish was a member of the police reserve organization?

A. I didn't know that until I think he mentioned it in just natural conversation, not that night; I mean, sometime.

Q. When did he mention it to you?

A. I don't remember.

Q. Before the deliberation, at any rate? [64]

A. No, I think he said that while we were in the room when other questions came about.

Q. In the deliberation room? A. Yes.

Mr. Hoddick: Objection. Mr. Clark, you are not to discuss here anything that took place after the court room was locked, and no question was supposed to be asked. I move that the answer be stricken.

The Court: It may go out. You shouldn't have asked anything about what happened after the jury started its deliberations.

Mr. Ahrens: I didn't believe my question was directed as to what went on in the jury room,

(Testimony of Herbert A. Clark.)

merely as to when he found out Mr. Parish was a member of the reserve police organization. He volunteered the information that it was in the jury room.

The Court: But your question was narrowed down sufficiently, and besides that, Mr. Ahrens, you are here on the basis of the telephone call.

Mr. Ahrens: Yes, sir.

The Court: All right, let's stick to that.

Q. (By Mr. Ahrens): What purpose did you have in discussing this 'phone call with Mr. Parish?

A. I can't say. It was after deliberation.

Q. Weren't you outside—I am talking about the time [65] you were outside, before the deliberation, when you were worried about making this 'phone call.

A. Oh, yes. It was just something that came to my mind, I wanted to make a 'phone call.

The Court: May I clear that up. After the Court finished its instructions, the Court asked the jury to step outside while I heard the lawyers on a point of law.

The Witness: Yes.

The Court: That period of time is not covered by this prohibition against your testifying. It is only after the doors were locked and the twelve and only twelve jurors were in here alone deliberating that you cannot testify. So, as I understand him, it was during that time after instructions and before being given to the charge of the Marshal and

(Testimony of Herbert A. Clark.)

his deputy that he spoke to Peter in the hallway and Mr. Parish in the hallway about a telephone call. Am I right?

The Witness: Yes, sir.

Q. (By Mr. Ahrens): And Mr. Parish, you say, volunteered the information that he, too, desired to make a 'phone call?

A. Yes. I believe that it came to his mind after I just made a statement that I would like to make a 'phone call and wondered if it was permissible.

Q. Before you were in deliberations, just before the time you approached Marshal Heine, do you recall whom you were next to? [66]

A. No.

Q. You hadn't started to deliberate before you asked about this 'phone call; is that right?

A. The Judge had just walked out of the room, and everyone else. That door was shut immediately, and Marshal Heine came from this door, and the group of men were standing about the vicinity between here and the desk and just milling around. I guess I asked the question as the door was being shut; I believe Moses was standing at the door shutting the door, both the inside and the outside, and probably the transom at the same time; I don't know.

Q. Do you recall Mr. Heine's conversing with some of the jurors over in that corner (indicating)?

A. No.

Q. Just before you approached him?

(Testimony of Herbert A. Clark.)

A. There were a lot of men talking about nothing.

Q. Talking about the case?

A. No, about nothing, just a lot of jabber.

Q. Go over just once more what, approximately, was the exact question you asked Marshal Heine, to the best of your knowledge?

A. Would I be allowed to make a 'phone call.

Q. And his answer?

A. To the best of my knowledge, he said, "Yes, I think so," and then he asked Moses to accompany me to his office. [67] And I think at the same time everyone else in this room were instructed to wait till my return.

Q. By whom? A. By the Marshal.

Q. By the Marshal? A. Yes.

Q. So, without divulging the nature of your call, Mr. Heine said it would be all right for you to make a 'phone call?

A. I think he questioned me on what for.

Q. He did?

A. I think after he said "yes," he probably asked me why, and I probably told him. I imagine it was like that.

Q. You asked permission to make how many 'phone calls? A. Two.

Q. What did Mr. Heine say?

A. I believe he said to make them as short as possible, if it was necessary to make the calls.

Q. You told him about—You mentioned the fact

(Testimony of Herbert A. Clark.)

that you wanted to call the garage and you wanted to call your home; is that right?

A. I believe I did. I might not have, but I believe I did, because both of those subjects were on my mind. I did want to take care of them. I didn't see anything wrong with it. [68]

Q. But you are sure he gave you permission to make both of those 'phone calls? A. Yes.

Q. And the two of you were alone at that time?

A. No, we weren't alone. We were standing right here.

Q. How close were the others?

A. Right in the same vicinity, matter of a few feet.

Q. Where was Mr. Parish?

A. I can't say. I don't remember.

Q. When Mr. Heine called Mr. Moses, do you recall what he requested of Mr. Moses, what he instructed him to do?

A. I believe he instructed Moses to accompany me, and he called me by name, Mr. Clark, so I could be allowed to make a 'phone call.

Q. Make a 'phone call?

A. I don't know whether it was a 'phone call, or two 'phone calls. I don't know whether he said one or two.

Q. Well, since that was so important to you that you make two 'phone calls, it would seem to me you would remember whether or not you got permission.

(Testimony of Herbert A. Clark.)

A. I had permission to make my 'phone calls, whether one or two I just don't know.

Q. You could have made as many as you wanted to, then?

A. No, I knew I was under a time element to get back into this room as soon as possible, because he told me to [69] make them short.

Q. So as far as you knew, the only restriction on you was time?

A. Yes, because it was just merely personal. I didn't want to take up the jury's time any more than my own, and I didn't want to divulge what I was here for, and so I made them as brief as possible to my own satisfaction.

Q. But your impression was you were allowed to make as many 'phone calls as you wanted to? You had that permission?

A. No, I didn't have permission to call San Francisco or anything like that. I was allowed to make a 'phone call, or two 'phone calls, I guess, whatever I felt necessary. In my mind I felt that I had two calls to make and I was authorized to make my 'phone calls.

Q. If you wanted to make the third, you would feel you could do that, too, wouldn't you?

A. If something came to my mind after I had been in there, I think I would have asked permission to make a 'phone call. In fact, I believe when I made my second call, I asked the gentleman sitting there if I could make the call.

(Testimony of Herbert A. Clark.)

Q. Do you recall who it was?

A. It was the other man sitting there who took a message to give to my wife.

Q. Did you ever get anything from anybody after you got back? [70]

A. After we were through and walked out into the hall, before I left this building, Marshal Heine came up to me and handed me a slip of paper, saying, "Here is a message from your wife."

The Court: Wait a minute. I was trying to get your question.

Mr. Ahrens: I asked——

The Court: Now that I got your question, let me get his answer.

The Witness: After we were through with the case and after you had given us instructions that we were through until January 4 and left this court room, out in the hallway Marshal Heine walked up to me and handed me a piece of paper, saying, "This is a message from your wife."

Q. (By Mr. Ahrens): You didn't get that message until your verdict had been rendered; is that right?

A. Positive.

Q. It couldn't have been just after you got back?

A. Oh, no, the doors weren't opened after I came back in, to my knowledge.

Q. What were you and Mr. Moses discussing as you walked down the corridor towards the Marshal's office?

A. Nothing. He wouldn't talk to me.

Q. You were talking to him?

(Testimony of Herbert A. Clark.)

A. I might have made a few remarks to him, but he [71] wouldn't talk to me.

Q. How about on the way back?

A. He wouldn't talk to me.

Q. When you got into the Marshal's office, what did you do? Who preceded you? Did you walk first or Mr. Moses? Who was there? What happened?

A. I can't say whether I went in the doorway first or Mr. Moses. I know he was right with me. I would have had a hard time running away if I had any motive.

Q. Did you ask anybody to call for you or did you make the call yourself?

A. I made the first call to Auto Service Garage at that time, yes.

Q. You made the first call? A. Yes.

Q. Without talking either to Mr. Moses or Mr. Clark, or the other gentleman who was there?

A. Yes. I was authorized to make a 'phone call, and I was accompanied to the 'phone. I immediately got on the 'phone. I told you what I done after that.

Q. Are you familiar with the telephone system that is employed here in the Federal Building?

A. Am I familiar with the system?

Q. Do you know how to dial a number here in the Federal Building? [72]

A. I believe—Yes, because I had made a 'phone call, I believe it is the attorney's office, back here,

(Testimony of Herbert A. Clark.)

the first day I was here. I called my office saying I would not be back to the office, and I was told then to dial "O" before making my call. That was on the first day I appeared in this building.

Q. You mentioned you had trouble getting your number, you tried three or four times to get the garage.

A. I believe it was that way.

Q. How much time do you think that took you?

A. Oh, just a matter of a few second, minutes.

Q. Was Mr. Moses and was the other gentleman in the room at the time? Were they both in the room at the time you tried three or four times to dial this first number?

A. I believe they were. I believe they were.

Q. Were they facing you, do you know?

A. I was looking down at the 'phone; I had to dial the number. In fact, I had to look up the number before I dialed it. In fact, I think I asked somebody for a 'phone book.

Q. I see. How long did that conversation take with the man down at the station, about ten minutes?

A. Oh, no, I don't believe it took that long. I of course was guilty about even making a 'phone call, knowing the other men were waiting for me in here, and I just wanted [73] to protect myself on it, so I made my call. And, naturally, he was not going to take the time to run over here with my keys. I imagine he was going home himself, and

(Testimony of Herbert A. Clark.)

he didn't want to do me that favor, so in his mind, trying to figure out where he could leave my keys after locking my car where I would be able to get them and somebody else not get them, it would take a minute, or a few minutes. I didn't time it.

Q. What was the reason you gave him for wanting the car taken care of?

A. So the valuables in my car wouldn't be stolen, knowing the garage is left unattended after 5 o'clock, I believe it is.

Q. You told him you would be late?

A. Yes, I told him I was still on jury duty.

Q. You told him you were still on jury duty?

A. Yes.

Q. Did you mention you would be out deliberating?

A. I didn't use the word "deliberating."

Q. Or locked up, or anything like that?

A. I don't think so.

Q. Tied up?

A. I told him I might be tied up and I didn't know how long; that is the reason I wanted my car locked.

Q. You were going to decide on a verdict?

A. No, I didn't say that. [74]

Q. You didn't tell him that?

A. I don't think I did.

Q. You might have?

A. No, I don't think so. I understood Judge McLaughlin's orders that we weren't to discuss this in any way, shape, or form with anyone.

(Testimony of Herbert A. Clark.)

Q. Exactly what did you tell him as to why you were going to be tied up? You must have explained it.

A. No, there was no need to explain to him why I was tied up. He was just the service station attendant. I was merely interested in locking my car up.

Q. You did tell him you were on jury duty?

A. I was still on jury duty and I was detained.

Q. What time was it that you called the garage?

A. I didn't look at my watch. In fact, I believe in my own mind I didn't expect to find anybody there. I don't know whether it was before five or after five. I believe they close at 5. I was not sure I would get anybody over there. I don't know what time it was, the exact time. I knew it was getting on in the evening and I would be tied up.

Q. Now, it is my understanding that you attempted to contact your wife by 'phone.

A. Yes. The number was busy.

Q. How many times did you call your home, or your wife's [75] number.

A. While it was busy?

Q. How many times was the line busy?

A. Maybe a couple or three times, and then I decided that I had better get back in here. That is when I decided I had better get back in here quick.

Q. You didn't ask anybody if you could make that second 'phone call, did you?

A. I don't know.

(Testimony of Herbert A. Clark.)

Q. Just went ahead and made it right away?

A. Yes. I don't know whether I did or not.

Q. While you were waiting for that connection, who was it that stuck his head in the door and told you that you were wanted?

A. Someone way up the hall here yelled, I believe.

Q. It was just a voice in the distance you heard?

A. Well, I was looking up this way, I think, while I was trying to get my number, and I don't know just how I was called to make me aware of the fact that I was needed in here as soon as possible, because that was on my mind.

Q. Do you know who came up? A. No.

Q. What was said?

A. I don't know. There was some sort of summons in some manner. [76]

Q. But it was directed to you?

A. I think someone was trying to get me in here because I was probably delaying it.

Q. Somebody wanted to talk to you and get you back here?

A. It probably was the Marshal, I don't know. I don't think anybody else could be calling me, because the jurors were instructed to stay in here. I don't imagine anybody was out in the hall but the Marshal.

Q. You were very anxious to get away as soon as possible?

A. No. No. I just had two things in mind, the

(Testimony of Herbert A. Clark.)

locking of my car and getting my wife to Church, because I knew her interest was to get there because of the Christmas songs we were training for.

Q. So you were concerned about the car and your wife and the plans you had had for the evening?

A. Not my plans, because mine are flexible. In my work they are always flexible, other than the trial.

Q. Do you recall whoever it was that you handed the 'phone to getting an answer just as you were about to leave?

A. I didn't get an answer.

Q. No. Do you recall anybody talking over that same wire just as you left and started to walk back?

A. No.

Q. So, as far as you know, other than that note you received later, there might never have been a contact with the [77] number you called?

A. I didn't know whether the call was going to be made or not. I asked—I requested it, and I believe, to my knowledge, they said they would. I might have been in too much of a hurry to get back here to have received the right answer. He might have said he couldn't make it, but I was trying to get back into the court room.

Q. And you never talked to your daughter or anybody else on that second 'phone call?

A. Yes, I did.

Q. You did?

(Testimony of Herbert A. Clark.)

A. Yes, I did; now that you mentioned it, my daughter did come on the 'phone. I told her to call her mother, and it was too lengthy, and she didn't come to the 'phone, so I left a message. That is how it was, now that you mentioned it. I had forgotten all about that part of it. My daughter is six and a half years old, and you never can tell what she is going to do.

Q. You think maybe now that I mentioned it, you might have talked to somebody else on that first call at the garage?

A. No, I am positive. I just talked to Mr. Kim, and I did talk to my daughter to get her mother to the 'phone, and since she didn't, I left. It is true.

Q. What did you say to your daughter besides "Call your mother"? [78]

A. I think I told her that I wouldn't be home.

Q. Did you tell her why? A. No.

Q. Didn't she want to talk to you?

A. Oh, she always likes to carry a conversation on the 'phone of some sort.

Q. Did she try to carry on a conversation?

A. I think she asked me to bring her something home, the normal things a child will say to a parent.

Q. You talked to her about two minutes, maybe, before— A. I wouldn't know.

Q. How long did this whole business take from the time you left this room until the time you got back?

A. I didn't think it took more than three to five

(Testimony of Herbert A. Clark.)

minutes, but time can get away from you in a situation of that sort.

Q. Probably nearer ten, because you were getting impatient—because they were getting impatient; is that it?

A. I don't know. I was not watching the time. I am sorry.

Q. You mentioned that you dialed the garage about two or three times and that you dialed home about two or three times.

A. Yes, I did mention that.

Q. And you still say this whole transaction took only [79] about three to five minutes?

A. I believe so. It was all very fast even though there was a few busy signals, because as soon as the busy signal came on, I normally hang up a 'phone and try again.

Q. When you left and walked back, do you recall Mr. Clark's saying anything to you? That was the other gentleman sitting in Mr. Heine's office where you made the 'phone call.

A. No.

Q. No mention was made as to who called you down at the corridor or from around the door?

A. No.

Q. Did you make any inquiries as to who it was?

A. No. He may have pointed down saying somebody was calling me, or the Marshal was calling me, whoever was calling me. He may have said that, I don't know. I knew I was wanted back here as soon as possible, and a few things could slip your mind.

Mr. Ahrens: That is all.

The Court: Redirect.

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Any further evidence, Mr. Hoddick?

Mr. Hoddick: No, your Honor.

The Court: Rebuttal? [80]

Mr. Ahrens: It is our contention that there were definitely some irregularities that took place, namely, the fact that Mr. Clark made the 'phone call without the permission of the Court, although he did have the permission from the Marshal; secondly, that the Marshal gave permission without any authority and without disclosing that fact to the Court or attempting to get permission from the Court. These irregularities were specific violations of the Court's instructions to Mr. Heine, in that he was instructed to see that no one talked to the jurors or the jurors talked to anyone, or discussed the case with anyone.

The Court: Excuse me. I think there is one further fact that, in all fairness, ought to be more or less stipulated between Mr. Miho and myself, and that is this: that during the time I was in chambers and waiting for the jury to announce that it had reached a verdict, or something, Mr. Miho came in and we were passing the time of day, in the course of which you mentioned you had been informed that some one of the jurors was allowed to make a telephone call, and you asked me if that

was permissible. And I said, you recall, replying to you, that it was not unusual, but it was customary for the Marshal to first ask me to allow the jurors to make 'phone calls concerning their garages and their homes, and that type of thing.

Mr. Miho: That is not quite my understanding.

The Court: Is that substantially correct?

Mr. Miho: No, that is not my understanding quite, if your Honor please. I recall that I asked you in the corridor, not in your room.

The Court: That may be.

Mr. Miho: And I asked your Honor whether you had given permission to the Marshal, or whether the Marshal had asked your permission to have any of the jurors talk on the telephone, and you told me at the time you had not given the Marshal any such permission, right in the corridor. We were both standing. I think I was on my way in to see you on that specific point.

The Court: I can't agree to that.

Mr. Miho: Your Honor told me definitely no, and you looked very puzzled, and, I thought, displeased that such a thing had happened.

The Court: I probably was, and still am—don't misunderstand me. But, anyway, you and I had some conversation about it so that on or about the time it happened you knew about it and I knew about it.

Mr. Miho: Yes, I was disturbed about it. That is the reason I asked your Honor. I was on my way to ask your Honor if you had permitted that

and your Honor told me "no" you had not permitted it.

The Court: That is right. So far as giving permission, [82] I was not asked; I didn't know anything about it until you told me about it. I don't know whether this cuts any ice or not, but it does indicate when you did become aware of it, you did bring it to the Court's attention.

Mr. Hoddick: Would Mr. Miho care to stipulate for the record where he got the information about the 'phone call?

Mr. Miho: Will you excuse us just a moment.

(Counsel confer.)

Mr. Ahrens: I thank you for your patience.

Mr. Hoddick: I wanted to ask Mr. Miho if he cared to stipulate for the record where he got the information.

Mr. Miho: I saw them. I saw them come back. I think John, or somebody, called my attention to it, saying, "One of the jurors is talking on the telephone." So I stepped out and saw him coming back. He was accompanied by the Marshal. So I was very much disturbed that such a thing could happen.

I went to the bathroom first, the lavatory first, and on the way out I was talking to Mr. Ahrens, and one of the officers, I believe Mr. Sousa or Mr. Abbey was there, Mr. Sousa, I believe, was there, and somebody told me one of the jurors was out of the jury room. It was a shock to me, and I deliberately stuck my neck out with John Ahrens,

and we saw them coming back down. I went over to your Honor's office. [83]

The Court: My point in mentioning it is: as soon as it apparently came to your attention, you did speak to me.

Mr. Miho: Yes, I wanted to do everything possible to correct any error. I was not trying to build up any mistrial grounds. If I could have done anything to prevent it, I would have done it.

The Court: Now, Mr. Ahrens.

(Argument by Counsel.)

The Court: With respect to the motion to acquit on the grounds heretofore urged during the course of the trial on two occasions, the Court adheres to the rulings made at that time.

With regard to the new grounds advanced and made part of this motion to acquit and as also serving as grounds for a new trial, I do not see any merit to any of them and accordingly deny both the motion to acquit and the motion for a new trial for the following reasons:

(1) With respect to the juror Parish, it is a fact that he was and is a member of the reserve police force. The question is: Being such, did that affect, in point of law, his disqualifications? In my opinion it did not. It might well have served, if known, as a basis for the defendant's exercising one of his peremptory challenges. The failure of the defendant's counsel to know that fact so as to have been able to exercise, if he desired, a peremptory challenge on [84] the basis of

it, came about in such a way that it cannot be held to have been responsibility of the juror. It is true that at one time Mr. Miho, counsel for the defendant, asked a general question as to whether anyone had been or was a member of the reserve police organization or some similar law enforcement organization. Whether that question was directed primarily to the twelve prospective jurors then in the box being examined on their voir dire or was to have been deemed addressed to the entire panel is ambiguous. In any event, either Mr. Parish, who was then in the back of the room, heard the question and later forgot it, or did not hear it. But, aside from that general question, it appears quite plain that with respect to the contention that much weight is to be attached to that general question, the fact remains that Counsel for the defense did not rest on that general question alone but saw fit to examine as to this specific point each juror, except Mr. Parish, on this point. And as to the prospective juror Parish, he was the only one of the twelve selected whom the defendant did not question at all. But again I repeat: The fact that Mr. Parish was a member of the reserve police force did not, as a matter of law, disqualify him from service, but at best would have served, if the information came to light, as a basis upon which the defense could, if it desired to do so, elect to exercise one of its peremptory challenges. [85]

Now, with respect to the juror Clark who, in

fact, made two telephone calls during the time that the stage was being shifted and the court room being transformed by the Marshal into a jury room, which 'phone calls were made with the Marshal's knowledge and permission and under his direct supervision, and which 'phone calls, the evidence affirmatively discloses, related, one, to making arrangements as to the security of goods in his car at a garage, and, two, with respect to his not being, in all probability, able to get home until late and thus unable to take his wife to some Church choir practice, there is no doubt in my mind but what both telephone calls were irregular. The Marshal definitely should not have allowed the man to make the 'phone calls without getting permission of the Court. But I cannot see how, in any way, these two innocent 'phone calls prejudiced this defendant; and, regardless of upon whom the burden of proof rests as to proving prejudicial error—I deem it to rest on the moving party—it is clear from all of the evidence that these two 'phone calls, though irregular and without the sanction of the Court, in no way rendered this defendant's trial unfair or injurious, for it is, in addition, amply clear that the jury had not been given the court room as a jury room until after those 'phone calls were completed. No steps had been taken by the jury to deliberate, and it was only after Mr. Clark returned to the court room that the the court room was turned over to the jury [86] by the Marshal for deliberations and

the jury put under lock and key. So, under no stretch of imagination can that instance of Mr. Clark's two 'phone calls be deemed to have in any way prejudiced the fair trial that this defendant has been accorded.

And over all, with respect to both grounds, at the time of the rendition of the verdict, not only did the Court poll the jury, but, at the request of Counsel, the Court polled each individual juror separately as to his verdict.

Thirdly, with respect to the legislative history, we are all indebted to Mr. Ahrens for getting the legislative history of this change of wording from "for" back to "from"; but, unfortunately, his industry doesn't turn up anything that helps him, but it does establish quite clearly that the change in the statute back to the word "from" was for the purpose of conforming squarely and fully with the holding of the Casey case by the United States Supreme Court, and by that decision this Court is naturally bound, since it is still devolved.

So, for the reasons recited, in my opinion there is no merit to either of the motions and they are each denied, and on the basis of each and each ground thereof you may have an exception.

Mr. Ahrens: Take an exception.

The Court: All right. Sentence tomorrow morning, [87] ten o'clock.

(Thereupon, at 3:50 p.m., December 29, 1949, an adjournment was taken until 10:00 a.m., December 30, 1949.)

Certificate

I, Lucille Hallam, Official Reporter, United States District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of my shorthand notes as to testimony, stipulations, and rulings in hearing on motion of judgment of acquittal and alternative motion for a new trial in Criminal No. 10,256, United States of America v. Orestus Cavness, December 29, 1949, before Hon. J. Frank McLaughlin, Judge.

February 21, 1950.

/s/ LUCILLE HALLAM.

[Endorsed]: Filed February 28, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings and transcript of proceedings:

Indictment.

Affidavit and Search Warrant.

Motion for the Suppression of Evidence, Affidavit, and Notice of Motion.

Renewal of Motion of Judgment of Acquittal and Alternative Motion for a New Trial.

Judgment and Commitment.

Notice of Appeal.

Election of Defendant.

Bond.

Cost Bond.

Stipulation Extending Time to File Transcript of Record and Order Extending Time to File Transcript of Record.

Amended Designation of Record on Appeal.

Transcript of Proceedings—December 5, 7, 8, and 9, 1949; December 12, 13, and 14, 1949; and December 29, 1949.

I further certify that included in said record on appeal is a copy of the court minutes of December 5, 7, 8, 9, 12, 13, 14, 29, and 30, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of March, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: No. 12514. United States Court of Appeals for the Ninth Circuit. Orestus Cavness, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed March 28, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

ORESTUS CAVNESS,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANT-APPELLANT
ON APPEAL.

Comes now Orestus Cavness, Defendant-Appellant in the above-entitled cause, by Fong, Miho & Choy, his attorneys, and in conformance with Rule 9 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby

states that it is intended that the Defendant-Appellant shall rely upon the following points:

1. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for the suppression of evidence.

2. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for a new trial, which was argued on December 13, 1949.

3. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion for judgment of acquittal.

4. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's alternative motion for a new trial.

5. By reason of said errors and other manifest errors appearing in the record designated herein, the judgment of conviction should be set aside.

Dated this 25th day of March, A.D., at Honolulu, Territory of Hawaii.

ORESTUS CAVNESS,
Defendant-Appellant.

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ WALTER G. CHUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Comes now Orestus Cavness, Defendant-Appellant in the above-entitled cause, by Fong, Miho & Choy, his attorneys, and hereby designates for inclusion in the printed record on appeal the following:

1. Indictment filed September 15, 1949.
2. Affidavit and Search Warrant.
3. Clerk's Minutes of December 5, 7, 8, 9, 12, 13, 14, 29 and 30, 1949.
4. Official Reporter's Transcript of Evidence Taken and Proceedings had during the Trial.
5. Defendant's Motion for the Suppression of Evidence and Affidavit filed on December 5, 1949, in Open Court.
6. Official Reporter's Transcript of all Testimony Relative to the Affidavit on which the Search Warrant was based, taken during the hearing on the Motion for Suppression of Evidence.
7. Renewal of Motion of Judgment of Acquittal and Alternative Motion for New Trial filed on December 19, 1949.
8. Clerk's Minutes of December 29, 1949.
9. Official Reporter's Transcript of Testimony taken on December 29, 1949.
10. Judgment, Commitment and Sentence of the Court.

11. Notice of Appeal filed on January 9, 1950.
12. Election of Defendant filed on January 9, 1950.
13. Bond filed on January 9, 1950.
14. Cost Bond filed on January 20, 1950.
15. Amended Designation of Record on Appeal filed on January 25, 1950.
16. Defendant's Statement of Points to Be Relied Upon Appeal.
17. This Designation of Record to be Printed on Appeal.

Dated at Honolulu, T. H., this 25th day of March, A.D., 1950.

ORESTUS CAVNESS,
Defendant-Appellant,

By FONG, MIHO & CHOY,
His Attorneys.

By /s/ WALTER G. CHUCK.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

No. 12,514

IN THE

United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

FONG, MIHO AND CHOY,

Suite 202 Alakea Building,

Alakea and King Streets, Honolulu 13, T. H.,

Attorneys for Appellant.

FILED

AUG 2 1950

PAUL P. O'BRIEN,

CLERK

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Cases	Pages
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No. 12,514

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ORESTUS CAVNESS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

On the 15th day of September, 1949, the Grand Jury of the United States District Court for the District of Hawaii returned an indictment against the Appellant charging him with having purchased cocaine in the City and County of Honolulu, (Tr. 2, 3) Territory of Hawaii without the necessary Internal Revenue Stamps, contrary to the provisions of Section 2553(a), Title 26, U. S. Code, to-wit:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a) except in the original stamped package; and the absence of

appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

The Appellant entered a plea of not guilty, a jury was selected and the trial was commenced on December 5, 1949. (Tr. 45) The Appellant filed in Open Court on December 5, 1949, a Motion for Suppression of Evidence (Tr. 8, 9) based on the ground that certain evidence was seized unlawfully. After a hearing the Court denied said motion, but an exception to this ruling was noted. (Tr. 264-268) In due time the jury rendered a verdict of "guilty as charged". (Tr. 534) The Appellant duly noted an exception to the verdict as being contrary to the law and weight of the evidence. (Tr. 536) Before judgment and sentence were entered, the Appellant filed a Renewal of Motion for Judgment of Acquittal and an Alternative Motion for New Trial and after a hearing on both these motions the Court denied them but permitted exceptions on each and every ground set forth in these motions. (Tr. 613-616) Judgment and sentence were then entered. (Tr. 31-34, 616)

The United States District Court for the District of Hawaii, by virtue of Section 41(2), Title 28, U. S. Code as amended, had original jurisdiction of this

cause by reason of the fact that the Appellant was charged with the commission of a crime or offense cognizable under the authority of the United States.

On January 9, 1950, the Appellant filed a Notice of Appeal (Tr. 35) and with it the necessary bond. (Tr. 37)

The United States Court of Appeals for the Ninth Circuit, by virtue of Section 1291 of Chapter 83 Courts of Appeals, Title 28, U. S. Code, as amended, has jurisdiction to review this matter on appeal from the final decision of the United States District Court for Hawaii.

STATEMENT OF THE CASE.

The Appellant was charged by the Grand Jury in the District Court of the United States, for the District of Hawaii, with having purchased cocaine in the City and County of Honolulu, Territory of Hawaii, without the necessary Internal Revenue Stamps, contrary to the provisions of Section 2553(a), Title 26, U.S.C. (Tr. 2) To this indictment the Appellant entered a plea of not guilty.

On December 5, 1949, a jury was sworn and impanelled. On that day the Appellant filed a Motion for Suppression of evidence (Tr. 8) alleging that certain properties were unlawfully seized and requested that these properties be suppressed as evidence against him in any criminal proceedings. After a hearing the Court denied this Motion, but permitted an exception to its ruling. (Tr. 264-268)

During the hearing one of the witnesses made a statement (Tr. 402) which the Appellant believed was prejudicial to him and as a result moved for a mistrial. (Tr. 431) The Court denied this motion and an exception was taken. (Tr. 431-432)

After several days of hearing the jury returned a verdict of "guilty as charged". (Tr. 534-535) The Appellant then filed a Renewal of Motion of Judgment of Acquittal (Tr. 24) and an Alternative Motion for a New Trial. (Tr. 25) Argument was heard on the points listed in said motions after which the trial Court ruled that the Motions were without merit and therefore denied them but permitted exceptions on the basis of each ground thereof. (Tr. 613-616)

Judgment and sentence (Tr. 31-34, 616) were entered after which the Appellant filed a Notice of Appeal. (Tr. 35-36)

SPECIFICATIONS OF ERROR.

1. The trial Court erred in denying the Appellant's motion for the suppression of evidence.
2. The trial Court erred in denying the Appellant's motion for a new trial, which was argued on December 13, 1949.
3. The trial Court erred in denying the Appellant's motion for judgment of acquittal.
4. The trial Court erred in denying the Appellant's alternative motion for a new trial.

ARGUMENT.**ASSIGNMENT OF ERROR NO. 1.****THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S
MOTION FOR THE SUPPRESSION OF EVIDENCE.**

- A. The search warrant issued in the instant case was invalid in that the affidavit upon which it was based was incorrect.**

Mere clerical errors in an affidavit failing to state the correct date will not vitiate the search warrant based thereon. *Pera v. U. S.* (CCA 9th Cir.), 11 F. (2d) 772, 773. However, the date of July 10, 1949 on the said search warrant and Miss Wilson's affidavit was not a mere clerical error, but a gross error in that no purchase of one (1) capsule of cocaine was made on said date. To justify an issuance of a search warrant, it is essential that the exact date on which the alleged offense was committed be stated in the affidavit in order that the Court may determine whether probable cause exists for the issuance of warrant. *Welchance v. State*, 114 SW (2d) 781, 173 Tenn. 26.

It is, therefore, submitted that the search warrant issued in the instant case is invalid in that the date of said purchase of one (1) capsule of cocaine on the search warrant (Tr. 5-7) and affidavit (Tr. 3-5) of Gerry Wilson, the government's informer, were incorrect. On July 10, 1949, Miss Wilson stated that she visited the premises described in the search warrant (Tr. 5-7) and purchased on said day one (1) capsule of cocaine; whereas, on said date, the evidence shows she did not make such a purchase. (Tr. 190-193)

B. There was no legal arrest of appellant.

It is generally accepted that an officer attempting to make an arrest should make known his purpose and the official capacity in which he is acting and the cause of the arrest. Officer W. K. Wells did make known to Appellant his purpose and official capacity but only informed Appellant that he had a warrant to search the premises. (Tr. 52) At no time did Mr. Wells make known to Appellant that he was to be arrested. Also, it was not until Appellant was subdued, handcuffed, and brought into said described premises was the search warrant served upon him. (Tr. 54) In view of the foregoing facts, it is submitted that Appellant was never lawfully arrested.

C. In the arrest of a person without a warrant, the burden of proof is with the person arresting or causing the arrest, to show that the arrest was lawful.

In *Nelson v. U. S.*, (CCA, 8th Cir.), 18 F. (2d) 522, 528, the Court held:

“In the arrest of a person without a warrant, the burden of proof is with the person arresting or causing the arrest, to show that the arrest was lawful. 5 C. J. pp. 396, 408.”

It is submitted that the Government failed to sustain its burden of showing that the arrest of Appellant, prior to the time he was subdued, was lawful. Prior to the struggle, Officer Wells informed Appellant that he had a warrant to search his home. (Tr. 52) The only time Appellant was purportedly arrested was after he was subdued, the search warrant

was served upon him, and when certain evidence was found in Appellant's yard by Officer Abbey. (Tr. 121)

There is no doubt that an officer may arrest another without a warrant of arrest if there was probable cause to justify the arrest; but an officer cannot act upon mere suspicion.

"An officer acting without a warrant for an arrest and without attempting to make an arrest is not justified in making a search of a person upon mere suspicion that he has committed a crime."

4 *American Jurisprudence* 48.

The proper test in making an arrest is whether there was:

"probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof?" *Garske v. U. S.*, (CCA, 8th Circuit), 1 F. (2d) 620, 625.

"If a seizure is based on mere suspicion, and the facts do not justify an arrest, the subsequent discovery by an examination of the evidence secured by the seizure that the suspicion was well founded is not sufficient to make what was unlawful at its commencement a lawful search." *Garske v. U. S.*, 1 F. (2d) p. 625, *supra*.

In the instant case, the testimony of Officer Wells shows that he acted merely upon suspicion when he saw a Vicks inhaler tube in Appellant's right hand (Tr. 119-120) and that upon this suspicion alone he tried to obtain said Vicks inhaler tube by force. (Tr. 120) In addition, Officer Wells testified that it is

purely guesswork to tell the nature of a drug merely by looking at it and without chemical analysis. (Tr. 77-78)

It is therefore submitted that there was no lawful arrest of Appellant because Officer Wells did not act upon probable cause, but merely upon suspicion.

D. U. S. Exhibits Nos. 1 (Tr. 270), 2A (Tr. 347), 2B (Tr. 349), and 3 (Tr. 367-368), are inadmissible because they were obtained by an unlawful arrest and a forcible search upon appellant without a warrant of arrest, or probable cause, or a search warrant of appellant's body.

It is submitted that evidence obtained by an unlawful arrest, or by a forcible search upon another without a warrant of arrest, and without probable cause, or without a search warrant of a person are inadmissible as evidence against an accused.

In *Brown v. U. S.*, (CCA, 9th Circuit), 4 F. (2d) 246-247, the Appellant, after parking his car, removed a package from the back part of his car and started up the street. The package was not smooth and from its appearance might have contained bottles. An officer then placed Appellant under arrest. The officer, prior to that time, had been informed that the Appellant was a bootlegger, and was given the license number of his car, but the source of his information was not disclosed. Beyond these facts, the officer had no knowledge of any kind, and no information from any source that a crime was being committed in his presence and he testified that he had acted on suspicion only. The Court held:

(1) “While an officer may arrest without a warrant for a reasonable cause, *he can act only upon evidence*, he cannot act upon mere suspicion.” (Italics ours)

(2) “Arrest was without authority of law, and the property wrongfully seized was not admissible in evidence.”

In *Snyder v. U. S.*, (CCA, 4th Circuit), 285 F. 1, 2, Appellant, standing in a public street, was approached by Federal probation officer. Observing the inside of Appellant’s overcoat bulging out and the neck of a bottle protruding, the officer placed his hand on Appellant’s shoulder, “beat him up”, took the bottle and placed him under arrest. The officer admitted that he did not know the nature of the contents of the bottle until he had forcibly taken the same from Appellant’s pocket. The whiskey was subsequently admitted as evidence in the trial Court.

The Court held:

(1) “That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been frequently decided as not to require citation of authority.”

(2) “It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest.”

(3) “If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck which he could see protruding from the pocket

of Appellant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without having first secured a warrant, were illegal, and *the only justification was his suspicion is admitted by the evidence of the arresting officer himself.*" (Italics ours)

(4) "*The Federal Courts have heretofore adopted the policy of excluding evidence illegally obtained by a Federal officer*, whether the evidence so obtained was by unlawful invasion of his home or of his person, on the ground that to hold otherwise would be to require him to supply evidence against himself." (Italics ours)

In *Hernandez v. U. S.*, (CCA, 9th Circuit), 17 F. (2d) 373, the appellant was seen coming from a house wherein narcotics were suspected of having been sold, in the company of a woman suspected of being a narcotics dealer, and, as both of them were walking down the street, they looked around in what the officer thought was "a rather suspicious way". Both were arrested and searched and the appellant found to have narcotics in his pocket. The Court there correctly held that such circumstances did not justify an arrest and search without a warrant, but at the most constituted mere suspicion, and that the evidence obtained were inadmissible, saying:

(1) "Probable cause for an arrest has been defined to be a reasonable ground for suspicion, supported by *circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty*". (Italics ours)

(2) “At most, the circumstances were suffi-
defined to be a reasonable ground of suspicion,
circumstances, it has been repeatedly held, do not
constitute probable cause. It is true that the
Appellant was arrested in the commission of a
felony, as was *subsequently developed*, but the
officers were not apprised of that fact by their
senses or otherwise, and they had no reasonable
grounds to believe it.” (Italics ours)

In *U. S. v. Clark*, 29 F. Supp. 138, 139, 140, a
Federal narcotics agent, who had observed defendant
drive in to a station, approached the automobile in
which she was seated, placed her under arrest, al-
though he had no warrant of arrest, searched defend-
ant’s person although he had no search warrant, and
found concealed in her clothing several grains of
heroin not in the original stamped package, which he
seized. Immediately, before the arrest, the defend-
ant’s companion, who was an informer known to the
agent and officers with him to be reliable, indicated
to the agent by signal in accordance with a pre-
arranged code that the defendant actually had nar-
cotics in her possession. The Court, in passing upon
the motion to suppress the evidence, stated:

“The question is: Is the positive statement by
a citizen of good reputation to an officer that
another citizen has committed a felony, a reason-
able ground which will justify an arrest without
a warrant?”

Answering its own question, the Court made the
following holding:

“It seems to us that the Fourth Amendment to the Constitution, United States of America, is whittled away to nothingness if it is held that a citizen may be arrested and searched without a warrant of arrest or a search warrant if only it is shown that some reliable informer has said the citizen has committed or is committing a felony, without any showing whatever (and there was none here) that the informer’s information was itself more than mere guesswork and speculation.”

“Learned counsel for the Government suggests that even if the arrest of the defendant was unlawful, still the search of the defendant’s person was lawful. We are unable to agree, 1. The forcible seizure and search of another’s person is an arrest. 2. To justify either the arrest or the search, the officer must have had reasonable grounds to believe that a felony has been committed by the Defendant. In this case, such grounds have not been shown”.

In the instant case U. S. Exhibit No. 1 (Tr. 269, 270), four pieces of shattered Vicks inhaler tube picked up by Officer Shaffer in the area where the struggle took place (Tr. 244) were inadmissible as evidence against Appellant being acquired by force incident to an unlawful arrest and seizure of Appellant’s person.

Similarly, U. S. Exhibit No. 2A (Tr. 346-348), six capsules containing white substance picked up by Officer Shaffer in the area where the struggle took place (Tr. 203, 209, 256) were inadmissible as evidence against Appellant having been acquired by force

incident to an unlawful arrest and seizure of Appellant's person.

Similarly U. S. Exhibit No. 2B (Tr. 348), top of a Vicks inhaler tube and the two capsules adhering to it picked up by Officer Abbey were inadmissible as evidence against Appellant having been acquired by force incident to an unlawful arrest and seizure of Appellant's person. In this instance, Officer Abbey testified that Agent Wells directed him to use the blackjack to open Appellant's left hand. (Tr. 285, 321, 322) At that time, Officer Abbey noticed a small object falling from Appellant's hand, and after Appellant was subdued, Officer Abbey went back to the place of struggle and found the top of the inhaler tube with the two capsules adhered to it. (Tr. 285)

And U. S. Exhibit No. 3 (Tr. 367-368), a broken piece of a Vicks inhaler tube picked up by Officer H. Whitford out of Appellant's right hand (Tr. 363) after Officer Abbey had hit Appellant's hand with a blackjack (Tr. 363) was inadmissible as evidence against Appellant having been acquired by force incident to an unlawful arrest and seizure of Appellant's person.

ASSIGNMENT OF ERROR NO. 2.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL.

It is submitted that the lower Court erred in denying Appellant's Motion for a Mistrial (Tr. 431, 432) on the testimony of Officer Souza, who said that at

the time of struggle, Appellant appeared to be “hopped up”. (Tr. 402) Although the Court instructed the jury to disregard the remark (Tr. 403), it undoubtedly was indelibly impressed in the minds of the jurors, making a fair and impartial trial impossible.

In *Moore v. U. S.*, 150 U. S. 57, 60, 37 L. Ed. 996, 14 S. Ct. 26, the Court said that:

“Where the question relates to the tendency of certain testimony to throw light upon a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, *unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.*” (Italics ours)

In *Beck v. Wings Field, Inc.*, (CCA, 3rd Circuit), 122 F (2d) 114, 116, 117 the Court held:

“A wide range of discretion rests with the trial Court in the granting or refusing of a new trial. See Federal Rules of Civil Procedure, Rule 61, 28 U.S.C.A. following Section 723(c). In fact, it is only for an abuse of discretion in refusing a new trial that an appellate court will reverse.”

“Here we have a case of a gratuitous remark by a witness for the Plaintiff which not only Defendant’s counsel said was improper, but which the trial court told the jury was ‘highly improper’, and which counsel for the Plaintiff admits was improper. What, then, was the degree

of its impropriety? *Could its undeniably harmful effect be obliterated by the Court's admonition to the jury, or was it such that, in the contemplation of the law, the trial could no longer be proceeded with fairness and impartiality to the Defendant?* The question, therefore, with which we have to deal is whether the prejudicial and harmful effect of the volunteered remark could possibly be eradicated from the jury's thinking while deliberating upon the case. If it could, then no harm was done and the trial court's refusal to withdraw a juror was not error." (Italics ours).

"The effect of improper matter necessarily varies according to 'the atmosphere of the trial'."

"It will be conceded that, *ordinarily, prejudicial remarks of counsel call for the direction of a mistrial.* And it has been said that it is quite as necessary to protect a party against the improper remarks to a jury made by a witness as it is against such remarks when uttered by counsel. In either case, it is inexcusable, and the only protection the injured party has must come from the court, and it should act promptly in the matter. *Surface v. Bentz*, 228 Pa. 610, 613, 77 A. 922, 923, 21 Ann. Cas. 215." (Italics ours)

In view of the foregoing cases, it is submitted that Appellant is entitled to a mistrial because the remark by Officer Souza was indelibly impressed in the minds of the jurors, making a fair and impartial trial impossible.

ASSIGNMENT OF ERROR NO. 3.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S
MOTION FOR JUDGMENT OF ACQUITTAL.

- A. The United States failed to prove that the capsules and parts thereof, which contained cocaine were not in the original stamped package, did not have stamp tax on them, and did not come from the original stamped package.

Nowhere in the testimonies of the government witnesses or in U. S. Exhibits Nos. 1, 2A, 2B, and 3 in evidence was there any showing that the alleged capsules of cocaine were not in the original stamped package, did not have the appropriate tax paid stamps on them, and did not come from the original stamped package.

It is a necessary element of the crime charged that the cocaine was purchased without the necessary Internal Revenue Stamps. This cannot be assumed. It must be proved.

It is submitted that the U. S. failed to prove that the capsules and parts thereof were not in the original stamped package, did not have stamp tax on them, and did not come from the original package.

ASSIGNMENT OF ERROR NO. 4.THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S
ALTERNATIVE MOTION FOR A NEW TRIAL.

- A. The appellant was denied a fair trial because Mr. Samuel A. Parish, one of the jurors, was at the time of the trial a reserve police officer in the Honolulu Police Department.

In *U. S. v. Lampkin*, 66 F. Supp. 821, 824, the Court held that:

“It may fairly be said to be the rule that a juror owes the duty to the Court and to those who are interested in the case being tried where he is being examined touching his qualifications to serve as a juror, to answer truthfully, fully and fairly all questions asked upon the examination to determine his qualifications to serve as a fair and impartial juror, to the end that challenges may be intelligently exercised and unsuitable persons may be excused from serving as jurors in the case. *The juror should of course, whether specifically questioned or not, disclose any natural information which might bear upon his qualifications. . .*”
(Italics ours)

It is submitted that Appellant was denied a fair trial because Mr. Samuel A. Parish, one of the jurors, was at the time of the trial a Reserve Police Officer in the Honolulu Police Department. When a question was asked during the selection of the jury whether any member of the jury was or ever had been a member of the Reserve Officers of the Honolulu Police Department, Mr. Parish failed to respond thereto. (Tr. 538-540) Mr. Samuel A. Parish's sitting on the jury prejudiced Appellant to the extent that he was denied a trial by an impartial jury. In the absence of an impartial jury, Appellant was denied a fair trial.

B. The appellant was denied a fair trial by reason of the fact that Mr. Herbert A. Clark, one of the jurors, after the jury had been instructed to consider the verdict, did leave the confines of the jury room without permission of the Court and did make one or more phone calls.

These acts of Mr. H. A. Clark were in violation of his duties as a juror because said phone calls were

irregular and without sanction of the trial Court. (Tr. 615) These phone calls constituted a serious violation of his duties as a juror.

CONCLUSION.

In conclusion, Appellant contends that, in view of the foregoing authorities and arguments, the trial judge of the U. S. District Court for the District of Hawaii erred, to the prejudice of the Appellant in convicting Appellant of the offense of knowingly, wilfully, unlawfully and feloniously purchasing eight (8) capsules of heroin and grains of cocaine, said heroin and cocaine not then and there being in the original stamped package or from the original stamped package, in violation of Section 2553(a), Title 26, U. S. Code, as charged; that the trial judge erred in denying the Appellant's Motion for the Suppression of Evidence, Motion for a Mistrial, Motion for Acquittal, and Alternative Motion for a New Trial.

Therefore, it is respectfully submitted that the judgment of the said trial judge should be reversed and a new trial granted.

Dated, Honolulu, T.H.,
August 2, 1950.

FONG, MIHO AND CHOY,
Attorneys for Appellant.

No. 12,514

IN THE

United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

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FILED

SEP 29 1950

PAUL P. O'BRIEN,

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No. 12,514

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ORESTUS CAVNESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court of the United States
for the District of Hawaii.**

BRIEF FOR APPELLEE.

JURISDICTION.

Section 3231 of Title 18, U.S.C., confers jurisdiction upon the Court below; and Sections 1291 and 1294 of Title 28, U.S.C., grant appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

On September 15, 1949, the Grand Jury of the United States District Court for the District of Hawaii charged Orestus Cavness, the defendant and appellant herein, with a violation of Section 2553(a),

Title 26, United States Code, in the following indictment:

(Title of District Court and Cause)

INDICTMENT

The Grand Jury charges:

That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of coca leaves, to wit, 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Dated: Honolulu, T. H., this 15th day of September, 1949.

A True Bill,

/s/ HERMAN L. NICKELS,
Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,
United States Attorney.

(Endorsed): Filed September 15, 1949.

The appellant pleaded not guilty to this indictment on October 10, 1949.

The case was called for trial on December 5, 1949, and after detailed examination by counsel for the appellant, a jury was duly empaneled and sworn (R. 12, 614).

At the commencement of the trial, a motion for the suppression of evidence was filed by the appellant (R. 8-11), but consideration of the motion was postponed pending a proffer of evidence to which it would be applicable (R. 53). After a hearing which lasted two days and included the taking of testimony, the motion to suppress was denied (R. 264-268).

On July 19, 1949, Bureau of Narcotics Agent William K. Wells, in company with officers of the Honolulu Police Department, endeavored to serve a search warrant (R. 5-7) on the appellant as he was climbing out of his automobile in the driveway of his residence at 3811 Leahi Avenue, City and County of Honolulu, Territory of Hawaii (R. 51, 52). Before service of the search warrant could be effected by Wells, the appellant shoved him (R. 52, 201, 202, 284, 306, 361, 401). At the time the appellant resisted the service of the search warrant, he had a Vicks Inhaler Tube in his hand which he tried to destroy by chewing it (R. 52, 53, 202, 281, 361, 363). Wells, with the assistance of the Honolulu Police Department officers, arrested and finally subdued the appellant. Eight capsules containing cocaine (R. 334, 340, 341), two of which were adhered to the inside of the broken top of the Vicks Inhaler Tube, and parts of the broken Vicks Inhaler Tube were found on the lawn at the scene of the struggle (R. 54, 55, 203, 206, 244, 256, 285, 364). The lawn was otherwise clean (R. 206). It is to be noted that these capsules containing the cocaine fell from the appellant's hand during the struggle (R. 202, 281, 285).

Possession by the appellant on July 19, 1949, of cocaine not in or from the original stamped package having been proved, the appellant took the stand and flatly denied such possession (R. 489). That the jury did not believe him is apparent from the verdict of guilty which was returned on December 14, 1949, after seven days of trial.

After argument had been presented by counsel, and the jury had been instructed by the Court, but before the jury was locked up for the purpose of carrying on its deliberations and arriving at a verdict, juror Herbert A. Clark asked the United States Marshal if he could make a personal telephone call. Under the supervision of a Deputy United States Marshal, Mr. Clark made two telephone calls, one to his garage to make arrangements concerning his car, and the other to his home to advise his wife that he would be delayed (R. 541-609).

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT.

1. Was the seizure of the contraband cocaine the fruit of an unlawful search?

The seizure was lawful for the following reasons:

(a) The officers had a valid search warrant and lawfully entered the appellant's premises for the purpose of serving and executing that warrant (R. 3-7, 51, 52, 75).

(b) (1) The efforts of the officers to subdue the appellant, which resulted in the disclosure of his

possession of the eight capsules of cocaine, were lawful in that such efforts constituted an arrest of appellant for a violation of the Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, 18 U.S.C. 2231, committed in their presence (R. 52, 201, 202, 251, 284, 306, 361, 401).

(2) The officers had probable cause to believe the appellant had had in his personal possession contraband narcotics acquired in violation of the Act of December 17, 1914, c. 1, § 1, 38 Stat. 785, as amended, 26 U.S.C. § 2553(a), and seizure of the cocaine pursuant to the arrest of the appellant for this violation was lawful, even though no formal incantation was recited by the arresting officers (R. 3, 4, 202, 281, 361).

(c) The officers had probable cause to believe the appellant had narcotics in his personal possession which he was attempting to destroy or discard, and consequently their search for and seizure of the cocaine was reasonable and lawful even if they had not been armed with a search warrant and had not been making a lawful arrest (R. 3, 4, 202, 281, 361).

(d) When contraband narcotics are exposed to open view and no search is required as in the instant case, the seizure of such narcotics is not unlawful (R. 54, 55, 203, 206, 244, 256, 285, 364).

2. Did the trial Court err in denying appellant's motion for a mistrial after a witness for the United States testified " * * * that the defendant was 'hopped up' " and the trial Court promptly struck the state-

ment and directed the jury "to disregard it" (R. 402, 403, 431, 432) ?

No, the trial Court in denying the motion for a mistrial acted in an area of discretion and such prejudice to the appellant as might have resulted from the statement of the witness was cured by the trial Court's prompt action.

3. Was there adequate proof that the cocaine seized by the officers was not in the original stamped package?

(a) Yes (R. 463, 465, 517). The cocaine itself was evidence that it was not in the original stamped package or from the original stamped package (R. 60, 63, 67, 69, 209, 294, 340, 341).

(b) Even if there had been no evidence that the cocaine was not in or from the original stamped package, it would not have mattered, as proof of negative averments contained in an indictment is unnecessary.

4. Did the presence of Mr. Samuel A. Parish, a reserve police officer, on the jury so prejudice the defendant as to deprive him of a fair trial?

(a) No.

(b) This information was available to the appellant but he never asked Mr. Parish for it (R. 614).

5. Was the appellant denied a fair trial because one of the jurors, Mr. Herbert A. Clark, left the Court room to make two telephone calls unrelated to the case before the jury was locked up?

No, the appellant was not prejudiced by this, and it was in accord with established custom.

ARGUMENT.

I. LAWFUL SEIZURE.

A. The officers were seeking to serve and execute a valid search warrant.

The affidavit of Gerry Wilson, which was the basis for the search warrant, was sufficient in that violations of Section 2553(a), Title 26, United States Code, are set forth therein, with the assertion of the affiant under oath that she believes contraband narcotics are still on the premises defined in the warrant (R. 3, 4). This affidavit sufficed to give the United States Commissioner probable cause for the issuance of the search warrant. 47 A.J. 517-519.

Appellant argues (Appellant's Brief, p. 5) that the evidence reveals the affiant made no purchase of cocaine from the appellant on July 10, 1949, the date set forth in the affidavit. The appellant urges that such error in the affidavit undermines and renders invalid the search warrant issued thereon.

The record does not support the appellant's contention that the date of July 10, 1949, set forth in the affidavit is erroneous. The evidence shows that the affiant made a purchase of cocaine from the appellant on or before July 7, 1949 (R. 185, 196), but from the affidavit it is evident that the affiant made

many purchases of cocaine from the appellant and, having so stated under oath, it must be assumed that she in fact made a purchase of cocaine on July 10, 1949. Mr. Wells' testimony that the date of July 10, 1949, was erroneous was based on assumption and was not competent (R. 180-197).

Even assuming the date of July 10, 1949, was erroneous, such error does not invalidate the search warrant, as facts are alleged in the affidavit which gave the United States Commissioner probable cause to believe that contraband narcotics were on the appellant's premises at the time the warrant was issued. At most, there was a three-day discrepancy in the date, and this certainly did not prejudice the appellant in any manner. *Pera v. United States*, 11 F. (2d) 772 (1926—9 C.C.A.). In support of his position the appellant has cited the case of *Welchance v. State*, 114 S.W. (2d) 781, 173 Tenn. 26. In that case, a hearsay affidavit charging the defendant with possession of liquor in violation of State law was filed, and no date was set forth in the affidavit. In the *Welchance* case, the Court at page 782 quotes from *People v. Holton*, 326 Ill. 481, 158 N.E. 134, 137, as follows: "The search warrant, it is asserted, was void because the complaint failed to show probable cause for its issuance, since it stated that Miller bought liquor from plaintiff in error on December 14, 1925, and the complaint was not verified until ten days later. No hard and fast rule concerning the time within which the complaint should be made can be estab-

lished, except that it should not be too remote." In the instant case, assuming a discrepancy of three days, such discrepancy certainly would not make the affidavit in support of the search warrant too remote, especially when in the affidavit a course of conduct by the appellant extending over a considerable period of time is alleged.

To invalidate a search warrant, it is incumbent upon the defendant to show the United States Commissioner lacked probable cause for its issuance. *United States v. Napela*, 28 F. (2d) 898, 903 (1928); *United States v. Rellie*, 39 F. Supp. 21, 22 (1941). This, the appellant has failed to do.

B. The first restraint of the appellant by the officers was a lawful arrest.

1. Appellant's resisting service of the search warrant gave the officers lawful grounds to arrest him. When Narcotics Agent Wells endeavored to serve the search warrant on the appellant, the appellant violently pushed him (R. 52, 201, 202, 284, 306, 361, 401). This was a violation of Section 2231, Title 18, United States Code, committed in the presence of the officers, and constituted grounds for a lawful arrest. *Marron v. United States*, 275 U.S. 192, 198 (1927); 47 A.J. 528. The appellant having assaulted Agent Wells and having jumped out of his automobile, there was no time for a formal laying on of hands and recital of the standard formula, "You are under arrest for a violation of * * *" It was the

intention of the officers to arrest the appellant (R. 251), and physical restraint of the appellant's person was sufficient to constitute a lawful arrest. 6 C.J.S. 571, 4 A.J. 7.

Consequently, the disclosure of the cocaine which appellant had been carrying concealed in a Vicks Inhaler Tube in his hand resulted not from an unlawful search but from a lawful attempt by the officers to arrest him.

2. The arrest of the appellant was also lawful as an arrest for violaation of Section 2553(a), Title 26, United States Code. The officers had reliable information that the appellant had dealt in narcotics at 3811 Leahi Avenue, Honolulu, T. H., in violation of Section 2553(a), Title 26, United States Code (R. 3, 4). Their arresting of the appellant after he pushed Narcotics Agent Wells could be further justified as a lawful arrest for the illegal sale of cocaine to affiant Gerry Wilson. Having such reliable information that the appellant had committed a felony, it was not necessary that the officers obtain a warrant for his arrest.

Seizure of the cocaine pursuant to such a lawful arrest, based either on the appellant's violation of Section 2231, Title 18, United States Code, or his previous violation of Section 2553(a), Title 26, United States Code, was a lawful seizure. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

- C. Appellant was committing a violation of Section 2553(a), Title 26, United States Code, in the presence of officers, and his arrest and the seizure of cocaine were consequently lawful.**

The reliable information which the officers had that appellant was in the practice of selling narcotics at 3811 Leahi Avenue, coupled with his resistance to service of the search warrant (R. 52, 201, 202, 251, 284, 306, 361, 401) and his endeavors to destroy the Vicks Inhaler Tube (R. 202, 281, 361) which he was carrying in his hand and which contained the cocaine, gave the officers probable cause to believe he had contraband narcotics in his possession. Under the circumstances of this case, the restraint or arrest of the appellant and the seizure of the cocaine, which was in the nature of *caput lupi*, were both reasonable and lawful. *Carroll v. United States*, 267 U.S. 132, 147 (1925); *United States v. Rabinowitz, supra*, at 60-65; *Stobble v. United States*, 91 F. (2d) 69, 71 (1937—7 C.C.A.); *United States v. Sebo*, 101 F. (2d) 889, 890 (1939—7 C.C.A.).

- D. Seizure of cocaine not in or from the original stamped package and which is exposed to public view does not violate the Fourth Amendment.**

The officers were lawfully on the appellant's premises for the purpose of serving and executing the search warrant. On any of the theories outlined above, their arrest of the appellant was lawful.

It is submitted that when contraband cocaine is disclosed during the course of a lawful arrest, the seizure of such cocaine does not violate the provisions of the Fourth Amendment, which is only applicable

when it is necessary to make a search for the contraband articles. *Brady v. United States*, 148 F. (2d) 394, 395 (1945—9 C.C.A.).

If this Court should find that the officers did in fact make a search of the appellant's person in the course of making the arrest and that such search was responsible for the disclosure of the cocaine which he was carrying and attempting to destroy or discard, it is submitted that such search was lawful as being incident to a lawful arrest. Such search can also be supported under the doctrine of necessity set forth in the *Carroll* case.

If this Court should find that the cocaine was not exposed to the public view by the appellant prior to its seizure, and that it was necessary for the officers to search the lawn to find the cocaine, it is respectfully submitted that such a search of the lawn was authorized by the search warrant (R. 5-7). 56 C.J. 1234.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

During the course of the trial, prosecution witness Alfred A. Sousa was asked the following question (R. 402): "Q. Did you and the other officers have any difficulty in subduing the defendant?", to which Sousa answered: "A. Yes, we did; the defendant was very powerful. It seemed to me that the defendant was 'hopped up'." Counsel for the appellant promptly moved that the answer be stricken, and

the Court in striking it said (R. 403): "Definitely it may go out, and the jury is instructed to disregard it. Just answer the question that is asked you." This matter was never adverted to again in the presence of the jury.

Later, the appellant moved for a mistrial, which motion was denied (R. 431). In denying the motion, the Judge, who was in the best position to see the effect Sousa's statement and his instruction with reference to that statement had had on the jury, acted properly within an area of discretion. *Christensen et al. v. United States*, 16 F. (2d) 29, 30 (1926—9 C.C.A.); *Hazeltine v. Johnson*, 92 F. (2d) 866, 869, 870 (1937—9 C.C.A.); 5 C.J.S. 1033.

It is believed that the statement of the Trial Judge quoted by this Court in the *Christensen* case is particularly appropriate, "In this day and age, intelligent men, with honest motives, do not readily yield to the promptings of caprice, and courts may confidently depend upon their unbiased judgment when properly instructed touching their duty in exigencies of the character here impending."

III. THE APPELLANT WAS NOT ENTITLED TO JUDGMENT OF ACQUITTAL ON THE GROUND THERE WAS NO EVIDENCE THE COCAINE WAS NOT IN OR FROM THE ORIGINAL STAMPED PACKAGE.

The capsules containing the cocaine and the broken parts of the Vicks Inhaler Tube, which were introduced in evidence as United States Exhibits Nos. 1,

2-A and 2-B, in themselves evidence the fact such cocaine was not in or from the original stamped package. In tracing the possession of the cocaine from the time of its seizure to the time it was introduced in evidence, each of the officers testified there had been no change in its condition, and the Government chemist, Gilbert J. Carr, testified that he had made no changes other than to remove part of the cocaine from some of the capsules for purposes of chemical analysis (R. 60, 63, 67, 69, 209, 294, 340, 341). Counsel for appellant on two occasions moved for a judgment of acquittal on the ground that there was no evidence the cocaine was not in or from the original stamped package. Both times, this motion was denied (R. 463, 465, 517), and it must be assumed both from the jury's verdict and from the denial of these motions that no tax paid stamps were on the Vicks Inhaler Tube or the capsules containing the cocaine.

While the capsules of cocaine and the broken parts of Vicks Inhaler Tube in which the cocaine had been concealed were not evidence that such cocaine did not come from an original stamped package, such evidence was not required. *Flowers v. United States*, 83 F. (2d) 78, 81, 82 (1936—8 C.C.A.); *Nicoli v. Briggs*, 83 F. (2d) 375, 379 (1936—10 C.C.A.); *Williams et al. v. United States*, 138 F. (2d) 81 (1943—App. D.C.); 153 A.L.R. 1254. In the *Flowers* case, the appellant contended that there was no proof the morphine did not come from an original stamped package. The Court said that the insistence of the appellant "carries with it the necessity for the proof

of an element of negation ordinarily impossible of proof". The burden of proving that the cocaine came from an original stamped package was on the appellant. *Casey v. United States*, 276 U.S. 413 (1928). In the instant case, the appellant did not endeavor to sustain such proof, but simply denied possession of the cocaine (R. 489).

IV. THE APPELLANT WAS NOT DENIED A FAIR TRIAL BECAUSE A RESERVE POLICE OFFICER SERVED ON THE JURY.

After the conclusion of the trial and after the jury had returned its verdict, the appellant filed an Alternative Motion for a New Trial and charged in that motion that the appellant's rights had been seriously prejudiced because one of the jurors, a Mr. Samuel A. Parish, was a reserve police officer (R. 25-29). An examination of the record reveals that while counsel for the appellant asked all other prospective jurors whether they were reserve police officers, he did not ask any questions of Mr. Parish (R. 614). To offset this want of diligence, the appellant points out that a general question was asked of the jury panel as to whether any member of the jury was or ever had been a reserve officer of the Honolulu Police Department, and that Mr. Parish failed to respond to that question. In fact, Mr. Miho, counsel for the appellant, asked of a Mr. Kramer the following question: "Have any of you jurymen served as police reserve officers in the police force at any time?" (R.

540). Nowhere in the record does it appear that Mr. Parish heard this general question or that he ever *served* as a reserve police officer (R. 614).

As a matter of law, Mr. Parish's status as a reserve police officer did not disqualify him to serve as a juror. Act of June 25, 1948, c. 646, § 39; 62 Stat. 992; § 1861, Title 28, United States Code. Act of April 30, 1900, c. 339, §§ 83 and 84; 31 Stat. 157; § 635, Title 48, United States Code. Act of May 27, 1910, c. 258, § 6; 36 Stat. 447; § 636, Title 48, United States Code. Revised Laws of Hawaii, 1945, Secs. 9791 and 9792. It is submitted that the Trial Judge was correct when he said that Mr. Parish's reserve police officer status “* * * might well have served, if known, as a basis for the defendant's exercising one of his peremptory challenges,” (R. 613) but counsel for the appellant did not exercise due diligence in his questioning of Mr. Parish, and the appellant cannot now claim that he was prejudiced. 39 A.J. 64, 65.

Membership in a reserve police officer association, particularly where it is not shown whether such membership was active or inactive, does not raise a presumption that Mr. Parish was biased. *Remus v. United States*, 291 Fed. 501, 506-509 (1923—6 C.C.A.); 50 C.J.S. 976, 977. To invalidate the verdict, the appellant must show actual bias, and this has not been done in the instant case. *Frazier v. United States*, 335 U.S. 497, 510 (1948); *Dennis v. United States*, 339 U.S. 162, 167 (1950).

The appellant has cited the case of *United States v. Lampkin*, 66 F. Supp. 821, 824, but in that case the

appellant had failed to answer questions put to him on *voir dire* as a prospective juror, truthfully, and had been held in contempt. That case turned neither on the question of whether diligence had been exercised by counsel nor on the question of whether the information withheld by the juror would have revealed that he was biased.

V. THE FACT THAT ONE OF THE JURORS MADE TWO TELEPHONE CALLS UNRELATED TO THE CASE BEFORE THE JURY COMMENCED ITS DELIBERATIONS DID NOT PREJUDICE THE APPELLANT.

In the instant case, after the jury had been instructed by the Court and arguments made by counsel, one of the jurors, Mr. Herbert A. Clark, obtained permission from the Marshal to make a telephone call to his garage (R. 543, 555, 565). Mr. Clark was then taken by Deputy Marshal Moses to the Marshal's office to make the telephone call. In addition to calling the garage, Mr. Clark endeavored to call his wife, but at no time while he was separated from the other jurors did he have any conversation with anyone concerning the case (R. 591, 593, 604). At the time he made these telephone calls, the jury had not been locked up, had made no attempt to select a foreman, and had not commenced its deliberations (R. 557, 586, 587). All this was in accord with standard custom (R. 549).

As the Trial Judge said, the making of these two innocent 'phone calls by Mr. Clark did not preju-

dice the appellant in any way (R. 615). As was said in *Baker v. Hudspeth*, 129 F. (2d) 779, 782 (1942—10 C.C.A.), “The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the Court is to make sure that nothing they read, see or hear shall influence them in the consideration of the case committed to them.” That purpose was not defeated by Mr. Clark’s temporary separation from the other jurors, during which time he was in the custody of and under the supervision of a Deputy Marshal. The Supreme Court has recognized and sanctioned the separation of jurors when proper precautions are taken to safeguard the integrity of their verdict. *Holt v. United States*, 218 U.S. 245, 250, 251 (1910). In *Baker v. Hudspeth*, *supra*, at page 782, the Court asserted a principle which covers the instant situation:

“* * * we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions and admonitions of the court.”

The record reveals that Mr. Clark understood his obligations as a juror and lived up to them (R. 604).

CONCLUSION.

It is respectfully submitted that the evidence adduced at the trial of this cause adequately supports the verdict, that the Trial Court did not err in any matter brought before it in the trial of this case, and that the judgment of that Court should be affirmed.

Dated, Honolulu, T. H.,
September 29, 1950.

Respectfully submitted,

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No. 12,514

IN THE

United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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No. 12,514

IN THE
United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

The Appellee's contentions in the Brief filed in the above entitled matter are as follows:

(1) There was lawful seizure.

(a) The officers were seeking to serve a valid search warrant.

(b) The first restraint of the Appellant by the officers constituted a lawful arrest.

(c) The Appellant committed a violation of Section 2553 (a) Title 26, U. S. Code in the presence of the officers and, therefore, his arrest was lawful.

(d) The cocaine seized was exposed to the public view and was not in or from the original stamped package and, therefore, its seizure was lawful.

(2) The Trial Court did not err in denying the Appellant's Motion for Mistrial.

(3) The Appellant was not entitled to the judgment of acquittal on the ground there was no evidence the cocaine was not in or from the original stamped package.

(4) The Appellant was not denied a fair trial because a reserve police officer served on the jury.

(5) There was no prejudicial misconduct on the part of one of the jurors.

ARGUMENT.

I. THE SEIZURE OF THE COCAINE WAS THE RESULT OF AN UNLAWFUL SEARCH.

A. The search warrant was invalid for there was no probable cause for its issuance.

The Appellee, on page 7 of its Brief, contends that the United States Commissioner had probable cause for the issuance of a search warrant and quotes 47 *Am. Jur.* 517-519 in support of its contention. It has apparently overlooked some of the more important sentences found in its authority, particularly on page 517 of said volume.

“A search warrant may issue only on evidence which would be competent in the trial of the offense before a jury, and would lead a man of prudence and caution to believe that the offense has been committed * * * The proof of probable cause which must be made before a search warrant may be issued must be of facts *so closely related to the time of the issue* of the warrant as to justify the finding of probable cause at *that time* * * *” (Italics ours.) 47 *Am. Jur.* 517.

In the case at hand, the purchase of cocaine was actually made by the Affiant, Gerry Wilson on July 7, 1949, and not on July 10, 1949, as alleged in the affidavit (Tr. 180). Agent Wells, a witness called for and by the Appellee, testified that the purchase of cocaine by the Affiant was made on July 7, 1949, and not on July 10, 1949 (Tr. 180). A period of five (5) days elapsed before the search warrant was issued (Tr. 5-7), but a period of twelve (12) days had elapsed before the search warrant was served. The facts on which the search warrant were based were, contrary to the rule previously stated, not so closely related to the date of the issue of the search warrant so as to justify a finding of probable cause at that time.

Whether or not the Affiant made any purchases of cocaine during the month of June, 1949 (Tr. 4), is immaterial in determining whether or not there was probable cause for the issuance of a search warrant, for the fact of the alleged purchase must be closely related to the time of issue of the search warrant, the time in this case being July 12, 1949. No assumption

can be made as to a purchase on July 10, 1949, as argued by the Appellee, for by the Affiant's sworn testimony, the only other purchases made by her, outside of the purchase alleged to be made on July 10, 1949, were made from June to July, 1949 (Tr. 5-7). This precludes any assumption that there were any other purchases made in July.

The Appellee quotes from *Pera v. U. S.*, 11 F. (2d) 772, as authority for believing an error in the date on the search warrant is immaterial, but that case is inapplicable to the situation at hand. There the Court deemed the error made to be an obvious clerical error and, furthermore, unlike the case at hand, the Court considered it very important that no objection was made in the trial Court by the defendant as to the service or the form of the search warrant.

B. The first restraint of the Appellant was not a lawful arrest.

The Appellee justifies the arrest of the Appellant on July 19, 1949, if there was such, by the alleged illegal sale of cocaine to the Affiant Gerry Wilson on July 7, 1949. It regards the information advanced by the Affiant to be "reliable information", sufficient to justify an arrest without a warrant. The contrary is indicated by the record. In the first place, Agent Wells knew little or nothing at all about the Affiant or her credibility (Tr. 86). Secondly, the Affiant was a "stool pigeon" or "informant" and certainly not the best of citizens (Tr. 82). Thirdly, the Affiant herself was guilty of illegal possession of narcotics (Tr. 88). We would like once again, to refer to *U. S. v. Clark*, 29

F. Supp. 138 quoted on page 11 of our opening Brief in which the Court felt that even a positive statement from a citizen of *good* reputation would not in itself justify an arrest of another citizen by an officer without a warrant.

Assuming, but not conceding the reliability of the information, there was no legal arrest for proper procedure to cover a situation such as this would have resulted in a warrant of arrest being executed by the Affiant. It is only in a few well-defined situations that arrests without warrants are valid. This is not one of those as argued in the preceding paragraph and because in this case twelve (12) days had elapsed from the time of alleged violation until the date of the arrest. During these twelve (12) days, it would have been easy indeed to have had a warrant of arrest issued.

Assuming further, but not conceding that there were grounds for a lawful arrest, we contend the Appellant was never lawfully arrested. The law of arrest requires an act of taking, seizing or detaining of another, but the act constituting an arrest must be performed with the intent to effect an arrest and must have been so understood by the one being arrested (4 *Am. Jur.* 5). The record is totally void of a showing of any such intent by the officers who allegedly arrested the Appellant at the first moment of the meeting between the officers and the Appellant. Mr. Wells testified that the Appellant was not arrested at the time the officers were brutally beating him (Tr. 121-122), and it was

not until the Appellant was taken into the house that he was arrested (Tr. 54 and 121). The physical restraint by the officers was not pursuant to any lawful arrest but merely action on the part of the officers to beat the Appellant into physical submission. Furthermore, there was no showing by the Appellee that the Appellant ever understood he was being arrested.

There was no time for the usual laying of hands and a recital of the standard formula used in arrests, it is claimed by the Appellee. The record speaks to the contrary for there were six (6) officers who spent three (3) to five (5) minutes (Tr. 124 and 393) beating the Appellant into physical submission. During this period none of the officers found time to announce an intention to arrest the Appellant, yet there was apparently time enough for one of them, Agent Wells, to replace his badge and the search warrant into his pocket before the subduing process began (Tr. 167-168). There was time, too, for the officers to discuss what the Appellant had in his hand (Tr. 173), to make a request to one of them to open the Appellant's hand (Tr. 173) and enough time to walk the Appellant to the house (Tr. 163).

C. The Appellant was not committing a violation of Section 2553 (a), Title 26, U. S. Code, in the presence of the officers and his arrest and the seizure of the cocaine were unlawful.

The Appellee tries to justify the alleged arrest of the Appellant by what was determined, subsequent to the arrest and through chemical analysis, to be cocaine. The Appellant was alleged to have been in the practice of selling narcotics; the Vicks inhaler which the Ap-

pellant had in his hand, at the time of the struggle with the officers, was suspicious looking and thought to contain cocaine; and, finally, the Appellant acted suspiciously by resisting service of the search warrant. These reasons, it is argued, warranted the arrest of the Appellant on the grounds of having committed a violation of Section 2553, Title 26, U. S. Code, in the presence of the officers. These grounds may have been sufficient to arouse suspicion but were not sufficient to constitute "probable cause", a necessary element in order to arrest without a warrant. *Brown v. U. S.* (CCA, 9th Circuit), 4 F. (2d) 246; *Snyder v. U. S.* (CCA, 4th Circuit), 285 F. 1, 2; *U. S. v. Clark*, 29 F. Supp. 138. Furthermore, the arrest cannot be justified by the determination, through subsequent chemical analysis, that the capsules attached to the Vicks inhaler were cocaine. *Hernandez v. U. S.* (CCA, 9th Circuit), 17 F. (2d) 373. The arrest must be legal and valid at the time it was made and cannot be substantiated by subsequent events or knowledge.

Carroll v. United States, 267 U.S. 132, has been quoted by Appellee on page 11 of its Brief in support of its contention. The *Carroll* case arises under the National Prohibition Act, an Act which provides that an officer, if he shall "discover" any person in the act of transporting liquor in an automobile, shall seize the said liquor, take possession of the vehicle and arrest the person in charge. The right to search an automobile and seize liquor under this law does not depend on the right to arrest the offender in the first instance, and the common law right to arrest is not

the test of the validity of the subsequent search and/or seizure, the Court held. Then, too, probable cause permitting arrest is more easily satisfied and by less stringent requirements because of the use in the National Prohibition Statute of the word "discover".

D. The search warrant did not permit a search of the lawn.

The capsules containing cocaine were found only after a search of the lawn (Tr. 285). The search warrant did not permit a search of the lawn. The basis for the issuance of the search warrant by the United States Commissioner was the Affidavit made by Gerry Wilson. A scrutiny of the affidavit reveals positive statements that "in a *one story wooden frame building* located at 3811 Leahi Avenue said building is painted white with red trimming, * * *" there was then being concealed and sold cocaine. The search warrant further reads: "Affiant further states that while *in* the premises * * * she had seen Orestus Cavness after he had received the money, he would go into another part of the *house* and return in a few minutes and would deliver the cocaine to the customer * * *" (Italics ours). There can be only one interpretation made of the statements set forth in the Affidavit. The place authorized to be searched was the wooden frame building, for the cocaine sold by the Appellant was obtained in another part of the house.

56 *Corpus Juris*, 1233, provides:

"The description (of the place to be searched) must be so specific so as to void any unauthorized invasion of the rights of privacy and the warrant

must identify the property as to leave no discretion as to the place to be searched.”

Appellee quotes 56 *Corpus Juris*, 1234, to justify the search of the Appellant’s lawn but the case supporting this quotation is one in which the premises to be searched was described as being a “ranch”. The word “ranch”, it was held, included the house and the surrounding real property. In this case, the premises authorized to be searched is a wooden frame building and that alone.

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT’S MOTION FOR A MISTRIAL.

Moore v. U. S., 150 U.S. 57, governs the statement made by Officer Souza regarding the Appellant’s apparent condition, to-wit: “hopped-up” (Tr. 402). This statement had no legitimate bearing on the question at issue and was only calculated to prejudice the accused in the mind of the jurors. After this remark was made, an impression unfavorable to the Appellant had been made on the minds of the jurors and no matter what the trial judge said, such could not and did not erase this impression from their minds. As a result, the Appellant was denied a fair trial.

Christensen et al. v. U. S., 16 F. (2d) 29, quoted on page 13 of the Appellee’s Brief can be distinguished for the prejudicial remarks made in that case were ones which the Court felt were brought about by the counsel for the Appellant. Consequently, the

Appellant could not complain on appeal, especially since he had not made a timely exception at the time the alleged prejudicial remarks were made in the trial Court.

III. THE APPELLANT WAS DENIED A FAIR TRIAL BECAUSE A RESERVE POLICE OFFICER SERVED ON THE JURY.

All of the prospective jurors were asked whether or not any of them had ever been a reserve officer in the Honolulu Police Department. The record, it is claimed, does not show that Mr. Parish, who was a member of the Reserve Police Organization of the City and County of Honolulu (Tr. 539), heard the question. Appellee would place a duty upon the Appellant in this case to show that all members of the jury panel heard this question. It is more logical for a presumption to arise to the effect that Mr. Parish heard this question, for he was in the room and within hearing distance.

Had Mr. Parish complied with his duty to reveal his status as a member of the Reserve Police Organization, a duty which the Court in *U. S. v. Lampkin*, 66 F. Supp. 821 places on a juror and not on a defendant, he would never have served as a member of the jury. Here was a situation in which the juror, by failing to respond to the question put to the jury panel, prejudiced the Appellant and denied to him a fair trial, for by doing this, the Appellant was never given an opportunity to challenge the juror. Challenges to prospective jurors have been set up in our

system of law for the purpose of assuring an impartial and fair trial. If this purpose is to be accomplished, then the opportunity to use the challenge must be available and cannot be circumvented because a juror has failed to respond to a proper question asked of the jury panel, especially when but for such failure information, which would have been basis for a challenge, would have been revealed. For this reason the Appellant was denied a fair and impartial trial.

CONCLUSION.

We respectfully submit that the trial Court erred in the foregoing matters brought before it in the trial of this case and that therefore, the judgment of the Trial Judge should be reversed and a new trial be granted.

Dated, Honolulu, T. H.,
October 20, 1950.

Respectfully submitted,
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No. 12,514

IN THE

United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING
and
MOTION TO STAY MANDATE.

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No. 12,514

IN THE
United States Court of Appeals
For the Ninth Circuit

ORESTUS CAVNESS,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Orestus Cavness, respectfully petitions for a rehearing in the above entitled cause. The grounds urged are these:

1. The court erred in upholding the ruling of the lower court denying appellant's motion to suppress evidence.
2. The court erred in upholding the ruling of the lower court denying appellant's motion for a mistrial because of misconduct of a government witness.
3. The court erred in upholding the ruling of the lower court denying appellant's motion for a new trial because of irregularities in the proceedings of the jury.

1. **THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.**

In presenting this ground a review of some of the facts is necessary.

On July 12, 1949, narcotic agent Wells obtained a search warrant authorizing him to search "a one story wooden-frame building located at 3811 Leahi Avenue, Honolulu, T. H." (T. 5-7.) The search warrant was issued upon the affidavit of one Gerry Wilson who alleged she had purchased cocaine from appellant at said premises on July 10, 1949. (T. 3-5.) Admittedly, this affidavit did not state the truth, for in preparing the affidavit for the affiant's signature, narcotic agent Wells erroneously placed therein the date "July 10, 1949" as a date of purchase, whereas in truth and fact the affiant had informed narcotic agent Wells that the date was July 7, 1949. (T. 179-185.) Whether the United States Commissioner would have issued the search warrant on July 12, 1949, if the affidavit had alleged a purchase on July 7, 1949, instead of July 10, 1949, is, of course, problematical.

Certain it is, however, that the search warrant did not authorize narcotic agent Wells to search the person of appellant or anybody else. But in the return to the search warrant the court will notice that narcotic agent Wells recites, "I received the attached search warrant July 12, 1949, and have executed it as follows: On July 19, 1949, at 5:40 o'clock p.m., I searched (the person) (the premises) described in the warrant". (T. 7.) Later on, appellant will show that

the evidence he sought to suppress was property unlawfully taken from his person.

A valid search of the house at 3811 Leahi Avenue pursuant to the search warrant of July 12, 1949, did not depend upon the presence of appellant at the premises. (*Trupiano v. United States*, 334 U.S. 699, 707-708, 68 S. Ct. 1229, 1233.) Nor did it depend upon reading or exhibiting the search warrant to him or serving a copy upon him. (*Nordelli v. United States*, 9 Cir. 24 F. 2d 665, 667.) Regardless of his presence at 3811 Leahi Avenue or his absence therefrom the search warrant could have been readily and lawfully executed at any time after its issuance on July 12, 1949.

But narcotic agent Wells made no effort to execute the search warrant until July 19, 1949. At 2:40 p.m. of that day, and accompanied by several police officers, he went to premises across the street from 3811 Leahi Avenue and kept the latter premises and activities thereon under surveillance until after 5:38 p.m. (T. 51-52.) He saw appellant in and about the premises around 3:55 p.m., and watched him drive away in an automobile. (T. 51.) When appellant returned in the automobile at 5:38 p.m., narcotic agent Wells and the police officers descended upon him. While appellant was still in the automobile he was told by narcotic agent Wells that the latter had a search warrant "to search the premises". (T. 52.) And when appellant in attempting to get out of the automobile shoved narcotic agent Wells aside, a scuffle ensued and the police officers proceeded to "subdue" appellant. (T.

52-53, 118, 122.) In the subduing process, the property appellant sought to suppress as evidence was blackjacked from his person. (T. 111.) He received injuries consisting of a scalp wound, a black eye, a bruised cheek, and a cut lip, requiring emergency hospital treatment which he received on the way to the police station at 8:03 p.m. (T. 502-507.) Appellant was not placed under arrest before the scuffle, during its progress, or at its conclusion. (T. 122.) He was handcuffed and taken inside the house wounded and bleeding. (T. 112-114, 129.) There a copy of the search warrant was served upon him, and some time later he was placed under arrest. (T. 121, 129.) His conviction rests upon the property blackjacked from his person.

It is very obvious, therefore, that the record before the court does not reflect a case of the lawful search of person or property incident to arrest. What the record so plainly reflects is a case where an unlawful search of the person has been followed by an arrest based upon the evidence uncovered by the unlawful search. Evidence thus obtained is clearly within the condemnation of the principles announced and applied by the Supreme Court in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222; *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367; *Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, and *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191. Appellant therefore respectfully urges that under the authority of those cases a rehearing should be granted, and the ruling of the lower court denying appellant's motion to suppress evidence should be disapproved.

2. THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION FOR A MISTRIAL BECAUSE OF MISCONDUCT OF A GOVERNMENT WITNESS.

It is a rule well recognized in federal practice that the volunteer statements of a witness may be so harmful to the case of a defendant in a jury tried action that admonitions to the jury are patently inefficacious and the granting of a mistrial is mandatory. (*Beck v. Wings Field, Inc.*, 3 Cir. 122 F. 2d 114, 117.) That rule is applicable here.

The evidence was undisputed that appellant, who is colored, was blackjacked, wounded, and subdued by police officers at the time the search warrant was executed. Whether the officers acted brutally and without justification was a vital and perhaps decisive issue in the case. A government witness, a police officer who participated in the subduing, volunteered the statement that appellant was "hopped up" at the time. (T. 402.) There can be no room for doubting that the volunteer statement was harmful to appellant. Nor can there be room for doubting that the witness thereby conveyed or suggested to the jury that appellant was under the influence of narcotics at the time and the police officers had to subdue him by force. Poison of that character once spread cannot be eradicated by admonitions. Its tainting effect must inevitably persist no matter what a trial judge may say to the jury about it. Only a mistrial can relieve a defendant from its menace and prejudice. Appellant therefore respectfully urges upon the court that a rehearing should be granted and further consideration had of the ground here presented.

3. **THE COURT ERRED IN UPHOLDING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE OF IRREGULARITIES IN THE PROCEEDINGS OF THE JURY.**

The court room was converted into the jury room for the deliberations of the jury on the submission of the cause. Without authority from the trial judge, the United States Marshal having custody of the jury assumed authority and permitted one of the jurors to leave the jury room, separate from the other jurors, and go to the marshal's office to make a telephone call. The juror took advantage of the opportunity to make a further telephone call in the marshal's office. At the hearing of the motion for new trial the marshal, two of his deputies, and the juror testified respecting the irregularity, and their various versions lacked harmony in many respects. (T. 451-610.)

On the surface, the conversations as reconstructed by the jurors were innocuous enough, but from the very nature of the conversations it is unreasonable to suppose that no reference to or comment upon the case in which the juror was sitting and about to deliberate was made during the conversations. Surely, where irregularities in the proceedings of a jury are involved, mere surface indications cannot furnish a safe or proper guide. The fact remains that officials charged with the custody of the jury and the duty of preventing improper influences from exerting themselves upon the jury, relaxed that custody and created an opportunity for improper influences to exert themselves. The situation here is not one where the performance of official duty may be presumed, for the

officials tell us that they did not perform their duty. And the fact remains that those participating in the irregularity differ in their versions as to what actually occurred and it is plain that what actually occurred has not and cannot be ascertained.

The sound rule applicable to the situation here is that the irregularity must be deemed prejudicial and require the granting of a new trial if there is a *reasonable possibility* that injustice has been done. (*Snyder v. Massachusetts*, 291 U.S. 97, 113, 54 S.Ct. 330, 335; *Little v. United States*, 10 Cir. 73 F. 2d 861, 865-866.) That reasonable possibility existed and persisted in this case. The lower court relaxed the rule of reasonable possibility in denying the motion for new trial. The sound administration of criminal justice should prompt a rehearing and the restoration of the rule.

Wherefore it is respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
April 2, 1951.

FONG, MIHO AND CHOY,
HERBERT CHAMBERLIN,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellant and petitioner in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco,
April 2, 1951.

HERBERT CHAMBERLIN,
*Counsel for Appellant
and Petitioner.*



No. 12,514

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ORESTUS CAVNESS,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

MOTION TO STAY MANDATE.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Orestus Cavness, in the above entitled cause, hereby respectfully moves this Court, in the event that his Petition for Rehearing filed herewith be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellant to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of Certiorari may

be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
April 2, 1951.

FONG, MIHO AND CHOY,
HERBERT CHAMBERLIN,
Attorneys for Appellant.

